78-699

No.

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

v.

ARLENE MATTERN, ETC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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CITATIONS

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OPINIONS BELOW

The initial opinion of the court of appeals (App. B, *infra*, 21a-58a) is reported at 519 F.2d 150. The second opinion of the court of appeals (App. A, *infra*, 1a-20a) is not yet reported. The initial opinion of the district court (App. C, *infra*, 59a-84a) is reported at 377 F. Supp. 906. The second opinion of the district court (App. D, *infra*, 85a-109a) is reported at 427 F. Supp. 1318.

JURISDICTION

The judgment of the court of appeals (App. E, *infra*, 110a-111a) was entered on June 30, 1978. On September 18, 1978, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including October 28, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Due Process Clause requires that an oral hearing be held before, rather than after, a Social Security beneficiary's payments are reduced in order to recoup an erroneous overpayment.

2. Whether Section 205(g) of the Social Security Act authorizes courts to grant class-wide injunctive relief in social security cases.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED

1. The Fifth Amendment of the Constitution provides in pertinent part:

> No person shall be * * * deprived of * * * property, without due process of law * * *.

2. The pertinent statutory and regulatory provisions involved in this case are set forth in App. F, *infra*, 113a-150a.

STATEMENT

1. Section 204(a)(1) of the Social Security Act, 42 U.S.C. 404(a)(1), provides that in the event of

an erroneous overpayment to a Social Security beneficiary, "proper adjustment or recovery shall be made, under regulations prescribed by the Secretary [of Health, Education and Welfare] * * * [by] decreas-[ing] any payment under this subchapter [relating to old-age, survivors', and disability insurance] to which such overpaid person is entitled." Section 204 (b) of the Act further provides, however, that "there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."

Once the Secretary initially has determined that an overpayment has been made, the recipient is notified and given an opportunity both to contest the determination in writing and to request that the Secretary waive recovery. He is invited to discuss his case with the local Social Security office. See 20 C.F.R. 404.907-404.913 (App. F, *infra*, 144a-147a). With one minor exception, adjustment or recovery is deferred pending review of the initial determination (App. F, *infra*, 120a-121a, 128a, 133a). If the Secretary decides on review that the initial determination of an overpayment is correct and that waiver of recovery is not warranted, the beneficiary's monthly benefit payments are reduced until the overpayment has been recouped (*id.* at 149a-150a).

Following the Secretary's decision on this initial review, the beneficiary is entitled to further adminis-

trative review, including a full evidentiary hearing. 20 C.F.R. 404.917 (App. F, *infra*, 148a-149a). If following the hearing, the Secretary determines that there has been no overpayment, or that the beneficiary is entitled to waiver of recovery, the beneficiary's withheld payments are repaid and subsequent payments are restored to the appropriate level.

2. Respondent is a recipient of disabled widows' benefits.[1] She became eligible in December 1971, but initial payment was delayed during reconsideration of her eligibility. In January 1972 respondent informed her local Social Security district office that she was in financial distress and requested immediate payments of benefits.[2] The district office's records erroneously indicated that respondent's eligibility began in May 1971, and it forwarded respondent's request to the regional office for payment of benefits covering May to December 1971.

A letter dated January 28, 1972, informed respondent that she would receive a special payment of $1,063.80 for the May to December period. That letter also stated that a possibility existed of duplicate payments, and that if she received more than

[1] The facts are set forth in the opinions of the court of appeals and the district court (App. B, *infra*, 25a-27a; App. C, *infra*, 60a-61a).

[2] The Social Security Claims Manual provides for expedited handling of cases where prompt action is necessary to meet the essential needs of the claimant.

one check she should return one of them to the district office. Before receiving either this explanatory letter or the special payment, however, respondent received her first regular monthly benefit payment of $119.30, covering December 1971. She received this check on or about January 26, 1972.

District office records indicate that respondent's sister called the office on January 28 and was told both that $119.30 was the correct amount and that the special payment check for $1,063.80 was incorrect and should be returned. The records also indicate that a district office representative telephoned respondent on January 28, 1972, and told her that she was not entitled to the special payment and should return it. Respondent did not return the check and denied receiving the call shown in the records.

On July 14, 1972, the Secretary notified respondent that the check for $1,063.80 was an overpayment and that her future payments would be reduced until the overpayment was recouped. The Secretary's letter told respondent that she was entitled to contest the Secretary's finding of an overpayment or to request the Secretary to waive the overpayment if she was not at fault in receiving it and recoupment would cause her serious financial hardship or be unfair for some other reason; the letter instructed her to submit any available documentary evidence, with her written request, within 30 days.

On August 7, 1972, respondent requested the Secretary to waive recovery of the overpayment, con-

tending that she was without fault in cashing it.[3] The Secretary determined that respondent was at fault because she had been informed of the possibility of duplicate checks in general and of the error in issuing the $1,063.80 check in particular. After reaffirming this decision on administrative reconsideration, the Secretary began recouping the overpayment at the rate of $30.00 per month by reducing respondent's benefit payments.

Respondent did not request further administrative review, in which she would have been entitled to a full evidentiary hearing. Instead, on December 29, 1972, respondent commenced this suit as a class action in the United States District Court for the Eastern District of Pennsylvania, contending that the Secretary's procedures for recovering overpayments violate the Due Process Clause because they do not afford claimants a pre-recoupment oral hearing.

The district court held that it had jurisdiction under 28 U.S.C. 1361 and certified the case as a class action on behalf of the class of "all persons eligible for Social Security OASDI benefits within the * * * Eastern District of Pennsylvania, whose benefits may be terminated, reduced or otherwise adjusted in order to recoup an over-payment" (App. D, *infra*, 83a). Relying on *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), the district court declared the Secretary's recoupment procedure unconstitutional and

[3] Respondent also alleged that recovery would cause her hardship. The Secretary has not disputed that allegation.

enjoined the Secretary from recovering the overpayment to respondent until she had been given an opportunity to present her case at a hearing. The injunction was later extended to most other members of the class.

The court of appeals agreed with the district court concerning jurisdiction, the propriety of class relief, and the basic constitutional questions, but it remanded the case to the district court for the entry of a more limited order that would require a prior oral hearing only when the Secretary's decision might turn on the credibility of witnesses (App. B, *infra*, 48a-55a). The Secretary sought review by this Court, which vacated the court of appeals' judgment and remanded for further consideration in light of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). See 425 U.S. 987 (1976). The court of appeals in turn sent the case back to the district court.

3. The district court held that this case is not materially different from *Eldridge*, in which this Court concluded that the Due Process Clause does not require an oral hearing prior to termination of Social Security disability benefits. It accordingly disavowed its prior approach and entered summary judgment for the Secretary, upholding the constitutionality of the recoupment procedures (App. D, *infra*, 105a-109a). Expressing doubts about the extent of its jurisdiction, the district court also revoked the certification of the case as a class action (*id.* at 99a-101a, 109a).

The court of appeals reversed (App. A, *infra*, 1a-20a) and held for the second time that the Secretary's procedures are unconstitutional. It first reiterated its holding that the district court had jurisdiction both to award benefits and to enter an injunction. This time, however, it relied on 42 U.S.C. 405(g) rather than 28 U.S.C. 1361 as the source of jurisdiction (App. A, *infra*, 7a-9a & n.9). It concluded that Section 405(g) is a source of jurisdiction, despite respondent's admitted failure to pursue the administrative process to completion, because respondent's due process arguments are essentially collateral to the issues raised by her particular claim to benefits.[4]

Turning to the constitutional question, the court first distinguished *Eldridge* on the ground that, "[u]nlike the disability benefits * * * considered in *Eldridge*," respondent's benefits (disabled widow's benefits) "are partly need-based" (App. A, *infra*, 11a).[5] The court therefore ruled that the private interest affected here is of greater significance than the private interest in *Eldridge*. The court next concluded that the social security disability determinations involved in *Eldridge* did not turn on the credibility of witnesses, but that such questions frequently would arise when the Secretary is asked to "waive" an overpayment.[6] Accordingly, the court thought that a prior oral hearing would be more useful in recoupment cases than it would be in making the decision on the existence or extent of disability.

Finally, the court found the governmental interest in recovering overpayments prior to an oral hearing to be insubstantial (App. A, *infra*, 15a-16a). The court concluded that the burden on the agency of providing a prior oral hearing in overpayment cases would be less severe than it would have been in the circumstances presented in *Eldridge*, and that a delay in beginning recoupment would not jeopardize the Secretary's ability to recover from subsequent benefit payments. It held that the Constitution requires an oral hearing prior to recoupment in "waiver" cases,

[4] The court of appeals instructed the district court to reconsider the question of class certification in light of this jurisdictional holding and *Liberty Alliance for the Blind* v. *Califano*, 568 F.2d 333 (3d Cir. 1977), which held that a class action may be maintained in social security cases as long as one member of the class satisfies the jurisdictional requirement of 42 U.S.C. 405(g). See App. A, *infra*, 8a and 20a.

[5] The court referred to the fact that the benefits "are subject to reduction when the recipient receives income from a number of other sources" (*ibid.*).

[6] The court distinguished two categories of overpayment disputes: "reconsideration" cases and "waiver" cases. The former generally involve the correctness of the Secretary's determination that an overpayment has occurred (*e.g.*, whether the computation of an earnings statement is correct, or whether two benefit checks have been received rather than one), and ordinarily can be resolved by analysis of documentary evidence. In "waiver" cases, the claimant requests the Secretary to forgive the overpayment on the ground that the claimant was not "at fault" in receiving it. See App. A, *infra*, 13a-14a.

which may involve issues of credibility, but not in "reconsideration" cases (App. A, *infra*, 18a-19a).

REASONS FOR GRANTING THE PETITION

This case presents the same questions that are pending before this Court in *Califano* v. *Elliott*, cert. granted, No. 77-1511 (October 2, 1978).[7] We therefore believe that the disposition of this petition should be governed by the Court's decision in *Elliott*.

CONCLUSION

The Court should defer disposition of the petition pending its decision in *Elliott*.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

OCTOBER 1978

[7] We have furnished a copy of our petition in *Elliott* to counsel for respondents, together with a copy of our brief in *Califano* v. *Aznavorian*, *prob. juris. noted*, 435 U.S. 921 (1978), a case to which our petition referred.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1629

ARLENE M. MATTERN,
Appellant,

v.

F. DAVID MATHEWS, Secretary of Health, Education and Welfare,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

D.C. Civil No. 72-2522

Argued February 17, 1978

Before GIBBONS, HUNTER, *Circuit Judges* and STAPLETON, *District Judge* *

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* Honorable Walter K. Stapleton, United States District Judge for the District of Delaware, sitting by designation.

OPINION

(Filed June 30, 1978)

HUNTER, *J.*

In this appeal we again examine the constitutionality of the procedures established by the Secretary of Health, Education and Welfare for recoupment of alleged overpayments under section 204 of the Social Security Act.[1] When this case was first presented to the district court, the administrative procedures were found to violate due process since they permitted an adjustment or reduction of social security payments without affording the beneficiary the right to a prior oral hearing. *Mattern v. Weinberger,* 377 F. Supp. 906 (E.D. Pa. 1974). On review, we affirmed that decision with certain modifications. *Mattern v. Weinberger,* 519 F.2d 150 (3d Cir. 1975). The Supreme Court granted the Secretary's petition for certiorari, and vacated and remanded the case for reconsideration in light of its decision in *Mathews v. Eldridge,* 424 U.S. 319 (1976). *Mathews v. Mattern,* 425 U.S. 987 (1976). We remanded the case to the district court, which reversed its earlier ruling and held the existing procedures satisfied the requirements of due process. *Mattern v. Mathews,* 427

1. 42 U.S.C. § 404 (1970):

(a) Whenever the Secretary finds that more or less than the correct amount of payment has been made to any person under this subchapter, proper adjustment or recovery shall be made, under regulations prescribed by the Secretary, as follows:

(1) With respect to payment to a person of more than the correct amount, the Secretary shall decrease any payment under this subchapter to which such overpaid person is entitled, or shall require such overpaid person or his estate to refund the amount in excess of the correct amount, or shall decrease any payment under this subchapter payable to his estate or to any other person on the basis of the wages and self-employment income which were the basis of the payment to such overpaid person, or shall apply any combination of the foregoing. . . .

* * * * * *

(b) In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.

F. Supp. 1318 (E.D. Pa. 1977). We reverse, since we do not believe that *Eldridge* and subsequent cases substantially alter the result in our original decision.

I. THE STATUTORY BACKGROUND AND REGULATIONS

Section 204 of the Social Security Act permits the Secretary to recover overpayments of benefits paid under Title II of the Act, 42 U.S.C. §§ 401 *et seq.*, by withholding a portion of future benefits until the amount of the overpayment is recouped. *Id.* § 404(a). The right of recovery, however, is limited by section 204(b), *id.* § 404(b). That section provides that there may be no recoupment when the overpaid beneficiary is "without fault"[2] and the recoupment either would "defeat the purpose" of Title II of the Act[3] or would be "against equity and good con-

2. "Fault" is defined in 20 C.F.R. § 404.507, which provides:

"Fault" as used in "without fault" (*see* §§ 404.506 and 405.355) applies only to the individual. Although the Administration may have been at fault in making the overpayment, that fact does not relieve the overpaid individual or any other individual from whom the Administration seeks to recover the overpayment from liability for repayment if such individual is not without fault. In determining whether an individual is at fault, the Administration will consider all pertinent circumstances, including his age, intelligence, education, and physical and mental condition. What constitutes fault (except for "deduction overpayments"—*see* § 404.510) on the part of the overpaid individual or on the part of any other individual from whom the Administration seeks to recover the overpayment depends upon whether the facts show that the incorrect payment to the individual or to a provider of services or other person, or an incorrect payment made under section 1814(e) of the Act [42 U.S.C. § 1395f(e)], resulted from:

(a) An incorrect statement made by the individual which he knew or should have known to be incorrect; or

(b) Failure to furnish information which he knew or should have known to be material; or

(c) With respect to the overpaid individual only, acceptance of a payment which he either knew or could have been expected to know was incorrect.

3. The phrase "defeat the purpose" of Title II is defined in 20 C.F.R. § 404.508, which provides:

(a) General. "Defeat the purpose of title II [42 U.S.C. §§ 401 *et seq.*]," for purposes of this subpart, means defeat the purpose of benefits under this title, i.e., to deprive a person of income required for ordinary and necessary living expenses. This depends upon whether the person has an income or financial resources sufficient for more than ordinary and necessary needs, or is dependent upon all of his current benefits for such needs. An individual's ordinary and necessary expenses include:

(1) Fixed living expenses, such as food and clothing, rent, mortgage payments, utilities, maintenance, insurance (e.g., life accident,

science."[4]

The Secretary's regulations provide the procedure for recovery of overpayments made to recipients of old-age or disability benefits. First, an initial determination is made that an overpayment has occurred and that section 204(b) provides no basis for a "waiver" of recoupment (20 C.F.R. § 404.905). All recipients subject to recoupment are then sent letters which set forth the reasons for the proposed recoupment, the availability of reconsideration of the determination of overpayment, the conditions for "waiver" under section 204(b), and the need to consult with a local Administration office within thirty days if the recipient feels that circumstances would justify reconsideration or "waiver" (Social Security Claims Manual § 5503; 20 C.F.R. § 404.907). Full benefits are paid during the thirty day period (Claims Manual § 5503.3).

Once a request for reconsideration or "waiver" and supporting documents have been filed, the Secretary may further delay recoupment until the case has been reconsidered (Claims Manual §§ 5503.3, 5503.5). If the Secretary adheres to his initial determination after the reconsideration (20 C.F.R. § 404.914), the claimant is so notified and benefits begin to be withheld. Only at that time, after benefits have been reduced, does the claimant have the right to an evidentiary *de novo* hearing (20 C.F.R. § 404.917). At the hearing, the beneficiary has the right to introduce oral testimony and to cross-examine witnesses. (20 C.F.R. §§ 404.917-404.934). A request for a hearing does not delay recoupment. While the record in this case is not clear, it appears that a delay of several months usually occurs between the time benefits are witheld and the first opportunity for a hearing. The hearing is first reviewable by the Appeals Council of the Social Security Administration (20 C.F.R. § 404.945) and then by a federal district court under section 205(g) of the Act, 42 U.S.C. § 405(g).

3. (Cont'd.)

and health insurance including premiums for supplementary medical insurance benefits under title XVIII [42 U.S.C. §§ 1395 *et seq.*]), taxes, installment payments, etc.;

(2) Medical, hospitalization, and other similar expenses;

(3) Expenses for the support of others for whom the individual is legally responsible; and

(4) Other miscellaneous expenses which may reasonably be considered as part of the individual's standard of living.

(b) When adjustment or recovery will defeat the purpose of title II. Adjustment or recovery will defeat the purpose of title II in (but is not limited to) situations where the person from whom recovery is sought needs substantially all of his current income (including social security monthly benefits) to meet current ordinary and necessary living expenses."

4. "Against equity and good conscience" is defined in 20 C.F.R. § 404.509, which provides:

"Against equity and good conscience" means that adjustment or recovery of an incorrect payment (under title II or title XVIII [42 U.S.C. §§ 401 *et seq.* or §§ 1395 *et seq.*]) will be considered inequitable if an individual, because of a notice that such payment would be made or by reason of the incorrect payment, relinquished a valuable right (examples (1), (2), and (5)) or changed his position for the worse (examples (3), and (4)). In reaching such a determination, the individual's financial circumstances are irrelevant.

II. Facts

The facts giving rise to this case are fully described in our original opinion, 519 F.2d at 154-55. Briefly, the named plaintiff in this suit, Arlene Mattern, applied in 1971 for disabled widow's benefits under 42 U.S.C. § 402(e)(1)(B)(ii), based on the social security earnings of her husband. Her application was approved and benefits were scheduled to begin in December 1971, after the statutory waiting period of six months.[5]

In January and February of 1972, plaintiff received two checks. She received her first regular benefits check in the amount of $119.30. Next, she received a special check for $1063.80 for benefits covering the period May to December, 1971. The latter check was erroneously issued.

The Social Security Administration contends that plaintiff was told to return the special check in a letter dated January 28, 1972 and in a telephone conversation on that day. District office records also show that the plaintiff's sister was told that plaintiff should return the special check. Plaintiff counters that the letter was ambiguous and was not understood to request the return of the $1063.80

5. The Act has since been amended to provide for a five-month waiting period. 42 U.S.C. § 423(c)(2) (Supp. V 1975).

check, and that she never received the phone calls. The check was never returned.

On July 14, 1972, plaintiff was sent a letter advising her that she had received $1063.80 more than she was entitled to and that an adjustment would be made in her forthcoming benefit payments. On August 7, 1972, plaintiff requested the Secretary to "waive" recoupment of the overpayment. "Refund" and "without fault" questionnaires were filed to support the request. Plaintiff listed her monthly expenses and stated that she had no other source of income, that she had been ill, that she had spent the proceeds of the check on her bills, and that she had never received any letter or phone call advising her that the $1063.80 check had been sent in error. The district office made an initial determination that Mrs. Mattern was not "without fault" and so denied the request for "waiver." The office relied on both the January 28 letter and office records of the phone calls. Plaintiff then filed a request for reconsideration, which was denied on January 3, 1973. The office determined that plaintiff's benefits amount would be reduced by $30 per month until the full amount of the overpayment was recovered.

Prior to the reconsideration, plaintiff filed this class action in the District Court for the Eastern District of Pennsylvania, seeking injunctive relief for her claim that the procedures followed by the Secretary violated due process by failing to provide for a hearing before the reduction of benefits. The district court originally held that the due process clause required a hearing prior to the adjustment of social security benefits. *Mattern v. Weinberger,* 377 F. Supp. 906 (E.D. Pa. 1974). Appeals by the Secretary eventually resulted in the district court reconsidering its decision in light of *Mathews v. Eldridge, supra.* In this second decision, the district court found jurisdiction under either 28 U.S.C. § 1361 or 42 U.S.C. § 405(g), or both, and held that due process does not require a hearing before recoupment commences by the withholding of benefits. Accordingly, the court granted a motion by the Secretary for summary judgment. The court also denied plaintiff's renewed motion for class certification. *Mattern v. Mathews,* 427 F. Supp. 1318 (E.D. Pa. 1977). Plaintiff filed a timely notice of appeal.

III. Jurisdiction

The Secretary argues that we are without jurisdiction to decide this case at this time. In our first opinion in this case, we found jurisdiction under the Mandamus Act.[6] 519 F.2d at 155-57. In its reconsideration of the case, the district court found that *Eldridge* had lowered the jurisdictional barriers to review under section 205(g) of the Social Security Act,[7] thus casting doubt on the propriety of the extraordinary mandamus jurisdiction. It therefore assumed jurisdiction at least under section 205(g).

The Secretary argues that section 205(h) of the Act prohibits the exercise of mandamus jurisdiction by this court.[8] He interprets recent Supreme Court cases as indicating that section 205(g) is the exclusive avenue of judicial review of decisions and procedures of the Secretary. *Califano v. Sanders,* 430 U.S. 99, 109 (1977); *Weinberger v. Salfi,* 422 U.S. 749, 764 (1975). *See also Norton v. Mathews,* 427 U.S. 524 (1976). The Secretary then con-

6. 28 U.S.C. § 1361 (1970):

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

7. 42 U.S.C. § 405(g) (1970), which provides, in part:

Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. . . .

8. *Id.* § 405(h):

The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter.

cludes that plaintiff's case is not ripe for review under section 205(g).

At the outset, we would note that it is far from clear that section 205(h) bars mandamus jurisdiction in this case. Several other courts, after considering the Supreme Court cases cited by the Secretary, have found jurisdiction under section 1361 in cases involving Social Security procedures. *See, e.g., Elliott v. Weinberger,* 564 F.2d 1219, 1225-28 (9th Cir. 1977), *petition for cert. filed,* 46 U.S.L.W. 3680 (U.S. April 21, 1978); *White v. Mathews,* 559 F.2d 852, 855-56 (2d Cir. 1977), *cert. denied,* 46 U.S.L.W. 3541 (U.S. Feb. 22, 1978); *Caswell v. Califano,* 435 F. Supp. 127, 131-33 (D. Me. 1977). Like the district court below, however, we do not need to reach the question of mandamus jurisdiction.

We hold that we have jurisdiction over this case under section 205(g), as interpreted by our recent decision in *Liberty Alliance of the Blind v. Califano,* 568 F.2d 333 (3d Cir. 1977). Before we may take jurisdiction under this section, plaintiff must satisfy two conditions. First, a claim for benefits must have been presented to the Secretary. Second, there must have been a final decision after a hearing. 42 U.S.C. § 405(g); *see Mathews v. Diaz,* 426 U.S. 67, 75-77 (1976); *Mathews v. Eldridge, supra,* 424 U.S. at 328-29; *Liberty Alliance of the Blind v. Califano, supra,* 568 F.2d at 344.

The first requirement was met by the plaintiff. The second requirement, which is essentially an exhaustion requirement, was not met, but is waivable either by the Secretary, *Mathews v. Diaz, supra,* 426 U.S. at 76-77, or by the court on its own determination, *Mathews v. Eldridge, supra,* 424 U.S. at 330-32. *Liberty Alliance of the Blind v. Califano, supra,* 568 F.2d at 344; *see Weinberger v. Salfi, supra,* 422 U.S. at 765-67. In *Eldridge* the Court discussed two factors in reaching its conclusion that further exhaustion should not be required. First, the claim presented in that case, the right to a hearing before disability benefits

are terminated, was said to be collateral to the substantive claim of entitlement to benefits. 424 U.S. at 330. We hold, and the Secretary concedes, that Mrs. Mattern's assertion of the right to a prior hearing is collateral to her claim for benefits. Second, the Supreme Court found that plaintiff had raised "at least a colorable claim . . . an erroneous termination [of disability benefits] would damage him in a way not recompensable through retroactive payments." 424 U.S. at 331 (footnote omitted). We find that the plaintiff in this case, in light of the financial hardship she alleges as a basis for "waiver" of recoupment, has made a colorable showing of irreparable harm from the interim reduction of benefits. We therefore find that this is a case where the claimant's interest in having the constitutional issue resolved promptly is so great that further deference to agency procedures is inappropriate. *Mathews v. Eldridge, supra,* 424 U.S. at 330; *see Liberty Alliance of the Blind v. Califano, supra,* 568 F.2d at 345-46; *De Lao v. Califano,* 560 F.2d 1384, 1388 (9th Cir. 1977); *Johnson v. Mathews,* 539 F.2d 1111, 1116-17 (8th Cir. 1976).[9]

IV. Due Process

The Secretary does not dispute that plaintiff's interest in social security benefits is a property right for purposes of the fifth amendment's due process clause. The Supreme Court in *Eldridge* considered this issue settled. 424 U.S. at 332. The question presented in this case is what process must be afforded a claimant before benefits are reduced in order to recoup an alleged overpayment. Basically, plain-

9. Appellant has argued that we should assume mandamus jurisdiction because of uncertainties about the availability of injunctive relief under section 205(g), 42 U.S.C. § 405(g) (1970). The Secretary has not contended that injunctive relief is unavailable under that section.

While Congress has the power to limit the equitable powers of the federal courts, such a limitation will not be found in the absence of a clear legislative statement. Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946); Hecht Co. v. Bowles, 321 U.S. 321, 330 (1944). Since there is no language in Section 205 clearly indicating this congressional intent, we conclude that a district court has the power to enter an injunctive decree under that section. *In re* Letourneau, 559 F.2d 892, 894 (2d Cir. 1977); Johnson v. Mathews, 539 F.2d 1111, 1125 (8th Cir. 1976).

tiff contends that due process requires that a recipient of benefits have a right to an oral hearing prior to the reduction of benefits, instead of afterwards as is now provided by the Secretary's regulations and practice.

The Supreme Court, in remanding this case to us, directed that we consider the matter in light of *Eldridge*. In that case, the Court set out a three-part balancing test for determining the specific process which is constitutionally required:

> More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, *e.g., Goldberg v. Kelly,* [397 U.S. 254,] 263-271 [1970].

424 U.S. at 334-35.

A. The Private Interest

One of the three factors involved in the balancing test in *Eldridge* is the plaintiff's interest which will be affected by the Secretary's action. The Court in *Eldridge* was dealing with the decision of the Secretary to terminate disability benefits. The Court in large part compared this interest to the "brutal need" of the welfare recipient in continued benefits, which formed the basis of the Court's decision in *Goldberg v. Kelly,* 397 U.S. 254, 263-64 (1970), that a hearing is required prior to a termination of benefits. While the plaintiff's interest in *Eldridge* was found to be substantial, it was not considered to be as strong as that

presented to the Court in *Goldberg*. First, unlike welfare payments, disability benefits under 42 U.S.C. § 423 are not need-based. Further, even if disability benefits are erroneously terminated, the claimant could turn to welfare payments. The *Eldridge* court, nevertheless, did not find this difference to be determinative of the question whether a prior hearing was needed, and emphasized that "the degree of difference [between the interest of the welfare and disability benefits recipients] can be overstated." 424 U.S. at 341.

The district court found that plaintiff's interest not to have benefits temporarily reduced was weaker than the interest in *Eldridge* not to have benefits temporarily terminated. We disagree with this analysis. Unlike the disability benefits under 42 U.S.C. § 423 considered in *Eldridge,* the benefits involved in this case are in part need-based and are subject to reduction when the recipient receives income from a number of other sources. *See* 42 U.S.C. § 403; *Elliott v. Weinberger, supra,* 564 F.2d at 1231. Further, when a recipient has claimed a "waiver" of recoupment, he is claiming that recoupment would defeat the purpose of the Act or would be against equity and good conscience. 42 U.S.C. § 404(b). The Secretary's regulations interpret the statutory prohibition of recoupment in terms of financial hardship to the recipient. *See* notes 2-4 *supra.* Therefore, when a waiver is erroneously denied by the Secretary prior to a hearing, the recipient faces a particularly severe impact.[10]

Even though the recipient subject to recoupment is faced only with a reduction of benefits, his need for full benefits, particularly if he qualifies for a "waiver," may often be greater than the need of the disability benefits recipient. Nevertheless, we do not believe that the plaintiff's

10. Although we do not know precisely how long the average claimant must wait for a hearing on a request for reconsideration or "waiver," administrative delays appear to be comparable to the "torpidity" considered by the *Eldridge* Court, 424 U.S. at 342. The length of deprivation of benefits is entitled to some weight in evaluating the plaintiff's interest in a pre-recoupment hearing. *See* Fusari v. Steinberg, 419 U.S. 379, 389 (1975).

interests here are as strong as those involved in *Goldberg*. The victims of erroneous recoupment, like the claimant in *Eldridge*, generally have resort to welfare and other benefits. We conclude that the private interest, particularly in the "waiver" cases, falls between that considered in *Eldridge* and that in *Goldberg*. *See Eliott v. Weinberger, supra,* 564 F.2d at 1231; *cf. Tatum v. Mathews,* 541 F.2d 161, 165 (6th Cir. 1976) (Supplemental Security Income program, 42 U.S.C. §§ 1381 *et seq.*); *Johnson v. Mathews, supra,* 539 F.2d at 1121-22 (same).

B. Utility of Prior Hearing

The second factor to be considered under *Eldridge* is the "fairness and reliability of the existing . . . procedures, and the probable value, if any, of additional procedural safeguards." 424 U.S. at 343. In that case the Court was faced with the termination of disability benefits, which under the statute and regulations would require a "medical assessment of the worker's physical and mental condition." *Id.* The Court found:

> This is a more sharply focused and easily documented decision than the typical determination of welfare entitlement. In the latter case, a wide variety of information may be deemed relevant, and issues of witness credibility and veracity often are critical to the decisionmaking process. *Goldberg* noted that in such circumstances 'written submissions are a wholly unsatisfactory basis for decision.' 397 U.S., at 269.
>
> By contrast, the decision whether to discontinue disability benefits will turn, in most cases, upon 'routine, standard, and unbiased medical reports by physician specialists' *Richardson v. Perales,* 402 U.S. [389,] 404 [(1971)], concerning a subject whom they have personally examined. . . . The potential value of an evidentiary hearing, or even oral presentation to the decisionmaker, is substantially less in this context than in *Goldberg*.

424 U.S. at 343-45. The court noted that the claimant's access to information in files and the opportunity to submit further information after an initial decision lessened the risk of an erroneous determination. The court also looked to the low percentage of all disability terminations which are reversed after administrative appeal, but noted that "although we view such information as relevant, it is certainly not controlling in this case." *Id.* at 347.

In our first decision in this case we relied to a large extent on the utility of a hearing as the determinant of what process should be due. In that opinion we separately analyzed "reconsideration" and "waiver" cases, and found a prior hearing generally not required in the former and generally required in the latter.

After a recipient of social security benefits receives a notice of an initial determination of overpayment and recoupment, he may request reconsideration of that decision. In our previous opinion, we agreed with the Secretary that " 'reconsideration' cases are generally well suited to resolution by documentary proof." 519 F.2d at 165. The decision of whether in fact an overpayment was made will usually turn on arithmetic calculations, such as whether the administration correctly computed an earnings statement, or whether two checks were received instead of one. We therefore concluded:

> In such circumstances, an examination of social security records and cancelled checks would seem to be sufficient, and it is hard to see how an oral hearing would be of much benefit to the claimant.

Id.

We distinguished "waiver" cases. While some of the issues involved in the determination of whether the Secretary is barred from recoupment by section 204(b) are susceptible of documentary proof, a substantial number are not. A "waiver" depends on fault, financial dependence, and detrimental reliance. *Id.* at 166-67, *Elliott v. Wein-*

berger, supra, 564 F.2d at 1232. Particularly the finding of fault and to a lesser extent the other two factors rest on a complex analysis of facts and of credibility. We noted that when credibility determinations were involved, the Supreme Court had indicated that written submissions were insufficient for an accurate determination and that an oral hearing would be needed. 519 F.2d at 164-67.

We believe that this analysis of the utility of a pre-recoupment hearing in reconsideration and waiver cases is fully consistent with *Eldridge.* Both our prior decision and the Supreme Court's analysis of due process focused on the nature of the evidence likely to be needed for a decision by the Secretary. When that evidence is well suited to evaluation in written form, there is little need for a prior oral hearing. When the Secretary's determination of a claim rests, for example, on credibility, an oral hearing is crucial to the truth-finding process and thus is an important element in deciding what procedures the Constitution requires. *See Goldberg v. Kelly, supra,* 397 U.S. at 268-69; *Kennedy v. Robb,* 547 F.2d 408, 414-15 (8th Cir. 1976), *cert. denied,* 430 U.S. 913 (1977). *See generally Board of Curators v. Horowitz,* 46 U.S.L.W. 4179, 4181-82 & n.4 (U.S. March 1, 1978); *Stretton v. Wadsworth Veterans Hospital,* 537 F.2d 361, 368-69 (9th Cir. 1976). This distinction is the same as was drawn by the *Eldridge* Court to contrast the need for a hearing prior to the termination of disability payments with the pre-termination hearing held to be required in *Goldberg.*[11] Accord, *Elliott v. Weinberger, supra,* 564 F.2d at 1231-34.

11. The *Eldridge* Court also viewed evidence of reversal rates as relevant to evaluation of the utility of a prior hearing. In that case, appealed reconsiderations were reversed at a rate of 58%. Since several decisions of the Secretary were reversed prior to this hearing stage, however, the court looked to the "overall reversal rate," i.e. the number of reversals after hearing in relation to all denials of benefits. This overall rate was 3.3%. 424 U.S. at 346 & n.29. *See also* Fusari v. Steinberg, 419 U.S. 379, 383 n.6 (1975).

According to information submitted to this Court, the reversal rates for recoupment decisions are similar to those in *Eldridge.* In 1970, approximately 1,250,000 overpayments were discovered. From these recoupment determinations, 1,600 recipients requested a hearing. Hearings resulted in 560 reversals. The reversal rate in the hearing was therefore 35%, and the "overall reversal rate" less than 1%. *See* Elliott v. Weinberger, 371 F. Supp. 960, 966-67

C. Governmental Interest

The third part of the *Eldridge* balancing test is the government's interest, including the governmental function involved and the fiscal and administrative burdens that a pre-recoupment hearing would involve. In large part we believe that the government interest involved in this case is similar to that analyzed in *Eldridge.* We do find some distinctions between this case and *Eldridge,* which indicate that our requiring a prior hearing would impinge less on the administration of social security benefits.

The *Eldridge* Court did not have clear evidence of the administrative burden of imposing a requirement of a hearing prior to the termination of disability payments. The Court commented that "[n]o one can predict" the increased demand for hearings if a hearing were required before termination instead of afterwards. It then reasoned, "the fact that full benefits would continue until after such hearings would assure the exhaustion in most cases of this attractive option." 424 U.S. at 347. Further, the Court faced widely varying estimates of the probable additional costs of pre-termination hearings, and so concluded that experience with constitutionalizing administrative pro-

11. (Cont'd.)
(D. Haw. 1974), *aff'd,* 44 U.S.L.W. 2175 (9th Cir. Oct. 1, 1975), *vacated and remanded,* 425 U.S. 987 (1976), *on remand* 564 F.2d 1219 (9th Cir. 1977), *petition for cert. filed,* 46 U.S.L.W. 3680 (U.S. April 21, 1978). The Secretary has advised the court that the Social Security Administration no longer keeps specific figures for overpayment appeals. However, the Secretary indicated his belief that these percentages have not substantially changed.

One of the elements in this appeal is the right to a hearing on claims for "waiver," under 42 U.S.C. § 402(b) (1970). In order to implement the decision in Buffington v. Weinberger, Civ. No. 734-73C2 (W.D. Wash. Oct. 22, 1974), *aff'd sub nom.* Elliott v. Weinberger, 44 U.S.L.W. 2175 (9th Cir. Oct. 1, 1975), *vacated & remanded,* 425 U.S. 987 (1976), *on remand,* 564 F.2d 1219 (9th Cir. 1977), *petition for cert. filed,* 46 U.S.L.W. 3680 (U.S. April 21, 1978), the Secretary instituted a system of informal hearings ("personal conferences") before denying "waiver" requests. The order applied to a nationwide plaintiff class, excepting those residing in the District of Hawaii and the Eastern District of Pennsylvania (where other similar suits were pending). In 1977, 42,880 waiver requests were considered, of which 19,535 were granted in the first instance. Of those denied, 1,212 resulted in a personal conference. After a conference, 350 decisions were reversed. Thus, the reversal rate after the pre-recoupment hearing was 29%, while the overall rate of increase of waivers granted was less than 2%.

While this data is relevant to our inquiry, we would echo the *Eldridge* Court's warning against reliance on "bare statistics," 424 U.S. at 346-47, and do not find this information controlling in this case.

cedures suggested that the additional cost "would not be insubstantial." *Id.*

First, on the basis of materials submitted to this court, we have reason to question whether the assumption in *Eldridge* about increased numbers of requests for hearings should be applied to our analysis of a right to a pre-recoupment hearing.[12] Although we agree that it is impossible to predict accurately the increased burden of providing hearings, we believe it likely that this burden would be less than was assumed in the circumstances considered in the Supreme Court's decision.

Second, we believe that the Secretary faces much less risk of loss of erroneous payments to recipients than was present in *Eldridge*. In that case, the hearing under discussion would determine whether the recipient was still eligible for benefits, after the Secretary had made an initial determination of ineligibility. If payments were made pending the hearing, the Secretary faced a substantial risk of paying benefits to an ineligible recipient without hope of recovering those funds. In contrast, the hearing we are considering is to determine whether the Secretary will be permitted to recoup an overpayment by deducting the amount from a continuing stream of benefits being paid to a concededly eligible recipient. In the general case, a delay in beginning recoupment will not jeopardize the Secretary's ability to recover from later payments. Thus, we believe that the Secretary's interest in preserving public funds is far less than was before the Supreme Court in *Eldridge*. *See generally Goldberg v. Kelly, supra,* 397 U.S. at 265.

12. Under a district court order, the Secretary has had some experience with providing an informal hearing prior to a decision denying a request that recoupment be "waived." *See* note 11 *supra*. In 1977, 42,880 "waiver" requests were filed, of which 23,345 were denied in the first instance. Of those denials, only 1,212 persons availed themselves of the right to a "personal conference" before their benefits were reduced. These figures do not show a great increase in the requests for hearings in comparison to the statistics for 1970, when 1,600 requests were made for a post-recoupment hearing for both waiver and reconsideration cases. While the 1977 figures are of course not necessarily predictive of future requests for hearings, the Secretary has not argued that this number is expected to rise. *See also* Elliott v. Weinberger, *supra,* 564 F.2d at 1235.

D. Conclusion

In our prior consideration of this case, we looked primarily at the utility of a pre-recoupment hearing. In light of the differences we found in the determination of a reconsideration and a "waiver" case, we distinguished the process which would be required in each. For reconsideration cases, where we found that documentary evidence was often sufficient for an accurate determination of whether an overpayment had been made, we concluded:

> Consequently, the Secretary's pre-recoupment procedures permitting written evidence and providing for an examination of written documents, when coupled with a right of a *post*-recoupment oral hearing, satisfy due process.

519 F.2d at 165. We did, however, add a caveat to this holding. Because we could not envision all of the sorts of inquiries which might be called "reconsiderations" under the regulations, we insisted that pre-recoupment oral hearing be provided when the Secretary's decision did not rest on documentary evidence, but instead involved an evaluation of the claimant's credibility. *Id.* at 165-66.

For "waiver" cases, in which we believed that credibility determinations would generally be crucial to the Secretary's decision, we held that the Secretary would generally be required to give a pre-recoupment oral hearing. We did limit the right to a prior hearing, however, to those cases in which such a requirement would serve a useful function:

> While we believe that claimants in "waiver" cases have a constitutional right to a pre-recoupment oral hearing, that right may not attach in all cases. Where a claimant in a "waiver" case raises no disputed issue of fact, or where, accepting his version of the facts as true, we could say as a matter of law that he was not entitled to retain the overpayment, then again it is hard to see how a pre-recoupment hearing would

> be of benefit. Thus, the constitutional requirement of a hearing may be limited to some extent by principles analogous to summary judgment in civil litigation.

Id. at 167 (footnote omitted).

We find that our analysis of due process in our first consideration of this case is substantially consistent with the three-factor balancing test set forth in *Eldridge*. *Accord Elliott v. Weinberger, supra.*

We believe that the plaintiff's private interest in having a pre-recoupment hearing, particularly in "waiver" cases, is somewhat greater than that which was before the Supreme Court in *Eldridge,* and that the government's interest in delaying the hearing is somewhat less. The most substantial difference between the recoupment procedure and the termination of disability is the value of a prior hearing to the fact-finding which the Secretary must perform. Generally, reconsideration cases may adequately be determined on the basis of documentary evidence, while generally we believe that a hearing is the only adequate proceeding for determination of a "waiver" case.

We hold that when the claimant has filed only for reconsideration, the balance of the three factors yields the same result as was reached in *Eldridge*—that a post-recoupment hearing will suffice. We adhere to our former opinion regarding reconsideration cases except in one respect. In the prior opinion, we said that if a reconsideration case should arise which rested on credibility evidence, a hearing would be constitutionally required. We do not believe that this qualification is consistent with *Eldridge,* which declares that procedural due process is to be shaped according to "the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions." 424 U.S. at 344.

When the recipient claims a "waiver," i.e. that the Secretary is barred from recouping an overpayment by section 204(b), we adhere fully to our prior decision. Because of the similarity of the "waiver" inquiry to that

considered by the Supreme Court in *Goldberg v. Kelly, supra,* and in light of the analysis of the *Eldridge* decision, we hold that the due process clause requires a pre-recoupment oral hearing when a recipient has filed a legally sufficient claim of entitlement to "waiver" of recoupment under section 204(b).

To the extent that a hearing is required, we do not believe that a full judicial or quasi-judicial proceeding is necessary. A court must be flexible in fitting procedural requirements to the circumstances of a case. *Board of Curators v. Horowitz, supra,* 46 U.S.L.W. at 4181; *Cafeteria Workers v. McElroy,* 367 U.S. 886, 895 (1961). After considering all factors under the analysis in *Eldridge,* we find that an informal, oral hearing will provide adequate safeguards to recipients of Title II benefits who are subject to recoupment. We adhere fully to the minimum standards for such a hearing which we described in our earlier opinion:

> We therefore believe that due process requires only an informal oral hearing which provides the following safeguards:
>
> 1) an impartial decisionmaker separated from those making the previous administrative determinations in the case;
>
> 2) timely and adequate notice to the recipient of the reasons for recoupment;
>
> 3) an effective opportunity for the recipient to confront and cross-examine adverse witnesses;
>
> 4) an effective opportunity for the recipient to present his own argument and evidence orally;
>
> 5) an opportunity to retain counsel or have the informal assistance of a friend, if the recipient desires;
>
> 6) a report written by the decisionmaker which informally states the reasons and the evidence relied on in reaching his decision;

7) an opportunity for all parties to receive and challenge the decisionmaker's report before it becomes final.

519 F.2d at 168-69 (footnotes omitted). *Accord Elliott v. Weinberger, supra,* 564 F.2d at 1235; *see Goldberg v. Kelly, supra,* 397 U.S. at 267-71.

V. Class Action

The district court denied plaintiff's motion for a class action. The only reason indicated for its departure from its certification of the class in its first consideration of the case, 377 F. Supp. at 915-916, was a citation to *Weinberger v. Salfi, supra.* Apparently the court was concerned over the compatibility of a class action with jurisdiction under section 205(g) of the Act, 42 U.S.C. § 405(g).

In *Liberty Alliance of the Blind v. Califano, supra,* which was decided after the trial judge's consideration of this case, we indicated that a class action could be maintained under section 205(g). Since we will reverse and remand this case, the district court should reconsider class certification in light of *Liberty Alliance. See also Johnson v. Mathews, supra; Caswell v. Califano, supra.*

The judgment of the district court will be reversed and the case remanded for further proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

United States Court of Appeals, Third Circuit

No. 74–1776

Arlene Mattern, on behalf of herself and all others similarly situated, appellee

v.

Caspar W. Weinberger, Secretary of Health, Education and Welfare, appellant

Argued January 24, 1975; Decided June 3, 1975

Before Van Dusen, Gibbons and Hunter, Circuit Judges.

Opinion of the Court

Hunter, Circuit Judge:

This appeal involves a challenge to the constitutionality of the procedure established by the Secretary of Health, Education and Welfare, pursuant to section 204 of the Social Security Act,[1] for the recoupment of

[1] 42 U.S.C. § 404 (1970):

"(a) Whenever the Secretary finds that more or less than the correct amount of payment has been made to any person under this subchapter, proper adjustment or recovery shall be made, under regulations prescribed by the Secretary, as follows:

"(1) With respect to payment to a person of more than the correct amount, the Secretary shall decrease any payment under

alleged overpayments of benefits. The district court, 377 F. Supp. 906 (E.D.Pa., 1974), found the recoupment procedure violative of due process since it permitted an adjustment or reduction of social security payments without affording the beneficiary the right to a prior oral hearing. While we are in substantial agreement with the opinion of the district court, we vacate and remand for entry of a new order consistent with this opinion.

I. Recoupment Procedure

Section 204(a) of the Act directs the Secretary to recover overpayments of social security benefits through recoupment of future benefit payments. Section 204(b), however, requires the Secretary to "waive" recoupment under certain circumstances. It provides that there shall be no recoupment where the overpaid beneficiary is "without fault"[2] and the recoupment either would "defeat the purpose" of Title II of the Act[3] or would be "against equity and good conscience."[4] Pursuant to these statutory directives, the Secretary has promulgated regulations providing for a four-step process of administrative review: an

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this subchapter to which such overpaid person is entitled, or shall require such overpaid person or his estate to refund the amount in excess of the correct amount, or shall decrease any payment under this subchapter payable to his estate or to any other person on the basis of the wages and self-employment income which were the basis of the payment to such overpaid person, or shall apply any combination of the foregoing.

* * * * *

"(b) In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."

Footnotes 2 and 3 on p. 3a; footnote 4 is on p. 4a.

initial determination that there has been an overpayment and that there is no basis for waiver of recovery (20 C.F.R. § 404.905); a reconsideration of that initial

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[2] "Fault" is defined in 20 C.F.R. § 404.507, which provides:

"'Fault' as used in 'without fault' (see §§ 404.506 and 405.355) applies only to the individual. Although the Administration may have been at fault in making the overpayment, that fact does not relieve the overpaid individual or any other individual from whom the Administration seeks to recover the overpayment from liability for repayment if such individual is not without fault. In determining whether an individual is at fault, the Administration will consider all pertinent circumstances, including his age, intelligence, education, and physical and mental condition. What constitutes fault (except for 'deduction overpayment'—see § 404.510) on the part of the overpaid individual or on the part of any other individual from whom the Administration seeks to recover the overpayment depends upon whether the facts show that the incorrect payment to the individual or to a provider of services or other person, or an incorrect payment made under section 1814(e) of the Act [42 U.S.C. § 1395f(e)], resulted from:

"(a) An incorrect statement made by the individual which he knew or should have known to be incorrect; or

"(b) Failure to furnish information which he knew or should have known to be material; or

"(c) With respect to the overpaid individual only, acceptance of a payment which he either knew or could have been expected to know was incorrect."

[3] The phrase "defeat the purpose" of Title II is defined in 20 C.F.R. § 404.508, which provides:

"(a) General 'Defeat the purpose of title II [42 U.S.C. § 401 et seq.],' for purposes of this subpart, means defeat the purpose of benefits under this title, i.e., to deprive a person of income required for ordinary and necessary living expenses. This depends upon whether the person has an income or financial resources sufficient for more than ordinary and necessary needs, or is dependent upon all of his current benefits for such needs. An individual's ordinary and necessary expenses include:

"(1) Fixed living expenses, such as food and clothing, rent, mortgage payments, utilities, maintenance, insurance (e.g., life, accident, and health insurance including premiums for supple-

determination upon request by the recipient (*Id.* § 404.914); an administrative hearing *de novo* before an administrative law judge (*Id.* § 404.917); and review by the Appeals Council of the Social Security Administration (*Id.* § 404.945). Judicial review is then available, under section 205(g) of the Act, 42 U.S.C. § 405(g), to claimants who have exhausted their administrative remedies.

While a claimant thus has a right to a full evidentiary hearing at the third step in the administrative process, such a hearing is not available until *after* the recoupment process has begun. When a claimant is notified of the initial adverse determination and of

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mentary medical insurance benefits under title XVIII [42 U.S.C. § 1395 et seq.]), taxes, installment payments, etc.;

"(2) Medical, hospitalization, and other similar expenses;

"(3) Expenses for the support of others for whom the individual is legally responsible; and

"(4) Other miscellaneous expenses which may reasonably be considered as part of the individual's standard of living.

"(b) When adjustment or recovery will defeat the purpose of title II [42 U.S.C. § 401 et seq.]. Adjustment or recovery will defeat the purpose of title II [42 U.S.C. § 401 et seq.] in (but is not limited to) situations where the person from whom recovery is sought needs substantially all of his current income (including social security monthly benefits) to meet current ordinary and necessary living expenses."

[4] "'Against equity and good conscience' is defined in 20 C.F.R. § 404.509, which provides:

"Against equity and good conscience" means that adjustment or recovery of an incorrect payment (under title II or title XVIII [42 U.S.C. § 401 et seq. or § 1395 et seq.]) will be considered inequitable if an individual, because of a notice that such payment would be made or by reason of the incorrect payment, relinquished a valuable right (examples (1), (2), and (5)) or changed his position for the worse (examples (3), and (4)). In reaching such a determination, the individual's financial circumstances are irrelevant."

his right to seek reconsideration, he is given thirty days in which to submit, in writing, his reasons why he disagrees with the determination that he has been overpaid or why he seeks a "waiver" under section 204(b) of the Act. Once such a request for reconsideration or waiver has been filed, even if the thirty days has expired, the recoupment procedure is automatically deferred until such reconsideration is completed.[5] If the Secretary adheres to his initial determination, the claimant is so notified and benefits begin to be withheld. At that time, the claimant is notified of his right to seek an administrative hearing *de novo*, with the right to present oral testimony and to cross-examine witnesses. A request for an oral hearing, unlike a request for reconsideration, will not toll recoupment. While the record is not entirely clear, it appears that there is usually a delay of several months from the time benefits are first withheld to the time a claimant is able to obtain an oral hearing.

II. The Facts

At the time this suit was filed, plaintiff Arlene Mattern was fifty-three years old and physically disabled. In 1971, she applied for disabled widow's benefits pursuant to 42 U.S.C. § 402(e)(1)(B)(ii), on the social security earnings record of her deceased husband. Her application was approved, and she became eligible for benefits as of May 18, 1971, with a monthly entitlement of $119.30. Because of a mandatory waiting period of six months,[6] plaintiff was not scheduled to begin receiving payments until December 1971. How-

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[5] Social Security Claims Manual, § 5503(c).

[6] The Act has since been amended to provide for a five-month waiting period. 42 U.S.C. § 423(c)(2) (1970).

ever, when plaintiff informed the social security office that she was in financial distress, she was issued, in February 1972, a check totalling $1063.80, which covered the period from May to December 1971. This payment was improper, since it had been issued in disregard of the mandatory six-month waiting period.

Plaintiff was advised of the forthcoming special check in a letter of January 28, 1972. That letter also informed her that there was a possibility of duplication of payment and that if she should receive more than one check, she should return one of them to the social security district office. Prior to the receipt of either the special check or the January 28 letter, plaintiff had received her first monthly payment of $119.30. According to records maintained by the district office, plaintiff's sister called the office on January 26, 1972, and was told that the $119.30 check was correct but that the impending special check of $1063.80 had been erroneously issued. The records also indicate that, on January 28, a district office representative phoned plaintiff to tell her that the special check being mailed was incorrect and should be returned. Plaintiff never returned the check, and denies that she ever received a phone call instructing her to return it.

Several months later, on July 14, 1972, plaintiff was sent a letter advising her that she had received $1063.80 more in social security benefits than she was entitled to and that since she had failed to return the check an adjustment would be made in her forthcoming benefit payments. Plaintiff was also informed of the "reconsideration" and "waiver" provisions of the law. On August 7, 1972, plaintiff requested the Secretary to waive recoupment of overpayment by filing both a "refund" and a "without fault" questionnaire, in which she listed her monthly expenses and

stated that she had no other source of income, that she had been ill, that she had spent the check on her bills and that she had never received any letter or phone call advising her that the $1063.80 check had been sent in error. The district office rejected her request for waiver, on the ground that she was not without fault in causing the overpayment. In making this initial determination, the district office relied on its letter of January 28, advising plaintiff that if she received more than one check, she should return one of them. It also relied on its records indicating that plaintiff had been notified by phone on January 28 that the $1063.80 check was incorrect and should be returned.

[1] Plaintiff subsequently filed a request for reconsideration and, in accordance with the Secretary's procedures, recoupment was deferred until completion of the reconsideration. On January 3, 1973, the district office reaffirmed its initial decision, and determined that her payments would be reduced by $30 per month until the full amount of the overpayment was recovered. In the meantime, plaintiff had filed this class action in the Eastern District of Pennsylvania. As a result of a stipulation between the parties, the plaintiff has continued to receive her full benefits until final disposition of her suit. The district court declared the recoupment procedure unconstitutional, and the Secretary appeals.[7]

[7] It appears from the record that the Secretary appealed from the wrong order. The notice of appeal indicates that he was appealing from the district court's order of April 30, 1974, which granted plaintiff's motions for a class action determination and for summary judgment, rather than from the final order of June 10, 1974, which granted injunctive relief. However, we believe that this defect is not fatal and that we can treat the appeal

III. Jurisdiction

Plaintiff asserted several bases of jurisdiction in her complaint,[8] but the district court found that only one of them was appropriate—the Mandamus Act, 28 U.S.C. § 1361 (1970).[9] Since we agree that jurisdiction is available under the Mandamus Act, we need not consider the other jurisdictional rulings made by the district court.

[2] It is well established that, in order for jurisdiction to lie in mandamus, a plaintiff must allege that the defendant owes him a clear, ministerial and non-discretionary duty. As we said in *Richardson* v. *United States*, 465 F. 2d 844, 849 (3d Cir., 1972), *rev'd on other grounds*, 418 U.S. 166, 94 S. Ct. 2940, 41 L. Ed. 2d 678 (1974):

> In order for mandamus to issue, a plaintiff must allege that an officer of the Government owes him a legal duty which is a specific, plain ministerial act "devoid of the exercise of judgment or discretion" [citations omitted]. An act is ministerial only when its performance is positively commanded and so plainly prescribed as to be free from doubt.

as having been taken from the underlying judgment. We believe that it is reasonable to infer that the intent of the Secretary was to appeal from the final judgment, and at oral argument counsel for plaintiff denied that his client had been prejudiced in any way. *See* Peabody Coal Co. v. Local Union Nos. 1734, 1508 and 1548. U.M.W., 484 F. 2d 78, 81–82 (6th Cir., 1973); Lumberman's Mutual Ins. Co. v. Massachusetts Bonding & Ins. Co., 310 F. 2d 627, 629 (4th Cir., 1962). *Cf.* Hodge v. Hodge, 507 F. 2d 87, 89 (3d Cir., 1975).

[8] 28 U.S.C. §§ 1331(a), 1343(4), 1346 and 1361 (1970).

[9] This Act provides:

"The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

The Secretary challenges the district court's holding that it had jurisdiction in mandamus on the ground that the duty which plaintiff seeks to compel is not a "ministerial act" which is "so plainly prescribed as to be free from doubt." After noting that the district court relied on *Goldberg* v. *Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed. 2d 287 (1970), in holding that due process mandated a pre-recoupment oral hearing, and after distinguishing *Goldberg* on the *merits*, the Secretary concludes that "the broad and indeterminate scope of the due process clause, as applied to the novel circumstances involved here, in no way discloses a plain and indisputable obligation that the Administration affc the hearings which the plaintiff has sought." (Br. at 34).

[3, 4] We believe that the Secretary's position is in error. Its chief deficiency is that in effect it confuses the issue of jurisdiction under the Mandamus Act with the process of resolving the merits of plaintiff's claim. We fully recognize that this case presents complex constitutional issues[10] which have not yet been definitively settled, and we agree that *Goldberg* v. *Kelly* is not plainly controlling. The complexity

[10] We also agree with the district court that the Mandamus Act encompasses constitutional obligations as well as statutory duties. See *Burnett* v. *Tolson*, 474 F. 2d 877 (4th Cir., 1973); *Mead* v. *Parker*, 464 F. 2d 1108 (9th Cir., 1972). In *Richardson*, *supra*, we held that mandamus was available to enforce a constitutional duty allegedly arising under the "Statement and Account" clause of the Constitution, Art. I, § 9, cl. 7, even though Congress had enacted a law expressly exempting the Central Intelligence Agency from the requirement to publish a statement and account of its receipts and expenditures. We also observed in Richardson that "mandamus should be construed liberally in cases charging a violation of a constitutional right." *Richardson*, *supra* 465 F. 2d at 851.

and novelty of the issues on the merits, however, do not necessarily deprive the federal courts of mandamus jurisdiction. A determination with respect to jurisdiction involves a threshold inquiry into whether the plaintiff has alleged a cause of action under the particular jurisdictional statute. Here, plaintiff alleges that the due process clause imposes an obligation on the Secretary to provide her with an oral hearing before adjusting her benefits. Thus, the duty alleged involves no element of discretion or room for judgment on the part of the Secretary,[11] and if we agree with plaintiff's contention on the merits, the result will be to place the Secretary under a binding, non-discretionary duty to provide a pre-recoupment oral hearing. Furthermore, the fact that the existence of the duty may become absolutely clear only after an interpretation of the due process clause and a consideration of the merits of the case does not deprive us of mandamus jurisdiction. See *Roberts* v. *United States*, 176 U.S. 221, 229–31, 20 S.Ct. 376, 44 L.Ed. 443 (1899); *Chaudoin* v. *Atkinson*, 494 F. 2d 1323, 1330 (3d Cir., 1974); *Carey* v. *Local Board No. 2, Hartford, Connecticut*, 297 F. Supp. 252, 255 (D. Conn.), *aff'd per curiam*, 412 F. 2d 71 (2d Cir.,

[11] This case is therefore distinguishable from *Jarrett* v. *Resor*, 426 F. 2d 213 (9th Cir. 1970), on which the Secretary relies. *Jarrett* held that mandamus does not lie to compel the Army to grant a soldier a discharge as a conscientious objector. That case thus involved an exercise of judgment as to whether that particular plaintiff had met the legal criteria for being a conscientious objector and would largely involve an evaluation of the sincerity of the claimant's beliefs. By contrast, the plaintiff here is not challenging an exercise of judgment, but is alleging a failure to comply with the mandates of the due process clause.

1969).[12] Acceptance of the Secretary's reasoning would lead to an oddly circular result—if mandamus jurisdiction were unavailable because, prior to ruling on the merits, the Secretary's duty is not clear, then a court would never have jurisdiction to determine *whether* his duty was clear in the first place.[13]

[5] Furthermore, we note that this is not a case where a plaintiff seeks to impose a wholly novel obligation on Government officials through the device of mandamus. While *Goldberg* v. *Kelly* may not be plainly controlling on the merits, it is a landmark precedent which imposes, under certain circumstances,

[12] See also *Schlagenhauf* v. *Holder*, 379 U.S. 104, 110, 85 S.Ct. 234, 13 L.Ed. 2d 152 (1969), where the Supreme Court indicated that mandamus was appropriate to settle novel and important problems; and *Garfield* v. *Goldsby*, 211 U.S. 249, 29 S.Ct. 62, 53 L.Ed. 168 (1908), where the Supreme Court held that mandamus was available to compel the Secretary of the Interior to restore plaintiff Indian to the rolls, because the Secretary, in the absence of statutory authority and in violation of due process of law, had stricken plaintiff's name from the rolls without providing notice and an opportunity to be heard.

[13] While the Secretary purports to disclaim advocating a "plain meaning" rule for purposes of determining mandamus jurisdiction (Brief at 34–35 n. 25), we believe that that is essentially what he does advocate, since he proceeds to contend that *Goldberg* v. *Kelly* is distinguishable, that the case law fails to establish an indisputable duty to provide pre-recoupment hearings, and that the result of an inquiry into the extent of the Secretary's obligations (apparently through examining legal precedents) "still leaves the issue in doubt." While we acknowledge that there is no binding precedent directly on point, we believe for the reasons already stated that that fact does not deprive us of mandamus jurisdiction. Jurisdiction depends on whether a plaintiff has alleged a cause of action, and if we rule in plaintiff's favor on the merits, the result of our inquiry will be to remove any doubt as to the Secretary's constitutional obligations in recoupment cases.

a constitutional obligation on administrators of social welfare programs to provide oral hearings, and thus it is at least arguably controlling in this case. Our task here is essentially to determine whether the same constitutional duty imposed by *Goldberg* in welfare termination cases is also applicable to social security cases involving recoupment of overpayments. Under these circumstances, we agree with the district court that the applicability of *Goldberg* is sufficiently apparent, in determining the threshold issue of mandamus jurisdiction, for us to say that plaintiff has alleged a clear duty on the part of the Secretary. We therefore believe that, since plaintiff here has relied on a closely analogous Supreme Court decision in alleging a clear constitutional duty owed her by the defendant, and since acceptance of her legal theory on the merits would establish such a clear duty, then jurisdiction to consider the merits exists under the Mandamus Act.

IV. The Class Action

[6] The Secretary raises two separate arguments challenging the propriety of the district court's order certifying the action as a class action. First, he contends that the district court erred in failing to provide notice to all the members of the class. Unlike the recent Supreme Court decision in *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed. 2d 732 (1974), this action was not maintained under Rule 23(b)(3) of the Federal Rules of Civil Procedure, but rather under Rule 23(b)(2). Thus, the mandatory notice provision of Rule 23(c)(2) does not apply. The Secretary, however, contends that some form of notice to all class members is constitutionally required, relying on *Eisen* v. *Carlisle & Jacquelin,* 391 F. 2d 555 (2d Cir., 1968). Recently, however, this Circuit has declined to follow the Second Circuit view and has held that notice to the absent class members is not constitutionally required in an action maintained under Rule 23(b)(2). *Wetzel* v. *Liberty Mutual Insurance Co.,* 508 F. 2d 239, 254–57 (3d Cir., 1975). We adhere to that view.[14]

The Secretary's second contention is that the class order was overbroad.[15] The Secretary bases this contention on a distinction he draws between two subclasses of recoupment cases. The first he terms "reconsideration" cases, in which a claimant merely denies that he in fact received an overpayment or disputes the amount he was allegedly overpaid. The second he terms "waiver" cases, in which the claimant concedes that he received an overpayment but seeks to rely on the provisions of section 204(b) of the Act,[16] *i.e.*, he contends that he was not at fault and that the recoupment would frustrate the purposes of the Act or would be against equity and good conscience. The Secretary further asserts that the plaintiff was only seeking to "waive" recoupment and thus could not represent individuals seeking "reconsideration." He therefore con-

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[14] We also note that the Second Circuit recently indicated that it did not intend to require notice in class actions brought under Rule 23(b)(2). *Frost* v. *Weinberger,* 515 F. 2d 57 (2nd Cir., 1975).

[15] The initial class order, issued on April 30, 1974, defined the class as "consisting of all persons eligible for Social Security OASDI benefits within the counties encompassed by the Eastern District of Pennsylvania, whose benefits may be terminated, reduced or otherwise adjusted in order to recoup an over-payment." Subsequently, in its order of June 10, 1974, granting final injunctive relief, the district court further limited the class in a manner not relevant to this appeal.

[16] *See* note 1, *supra.*

tends that, to the extent that the class encompassed "reconsideration" cases as well as "waiver" cases, it was overbroad.

As we discuss in greater detail *infra,* we agree that "reconsideration" and "waiver" cases present somewhat different legal issues, and thus we conclude that the final judgment must be modified to take these differences into account. However, we believe that a distinction must be made between requiring entry of a new judgment after ruling on the merits, which would have the incidental effect of limiting the class, and directly modifying the scope of the class prior to a ruling on the merits, which the Secretary appears to ask us to do. While this may seem at first glance to be a distinction without a difference, we believe that there would be a significant difference in this case. If we accept the Secretary's contentions that the class order was overbroad to the extent that it included "reconsideration" cases and that we should limit the class to "waiver" cases (on the ground that plaintiff sought only "waiver" of recoupment), then we could not even consider the constitutionality of the Secretary's recoupment procedure in "reconsideration" cases. *Cf. Kauffman* v. *Dreyfus Fund, Inc.,* 434 F. 2d 727 (3d Cir., 1970), cert. denied, 401 U.S. 974, 91 S. Ct. 1190, 28 L. Ed. 2d 323 (1971). If, however, we accept the class as defined by the trial judge, then we must consider the constitutionality of recoupment in both "waiver" and "reconsideration" cases, drawing whatever distinction we think is appropriate in terms of the relief granted.

[7] We conclude, however, that under established legal principles, we must accept the district court's definition of the class, and that we must therefore consider the constitutionality of all types of recoupment cases. While the Secretary argues basically that there were two distinct subclasses in recoupment cases and that plaintiff was a member of only one of them, the district court defined the class to include recipients in essentially all cases where benefits were recouped without a prior oral hearing.[17] Since such an order concerned the size of the class and since the Secretary made no motion in the district court, based on Fed. R. Civ. P. 23(a), to limit the class to "waiver" plaintiffs, the order was within the discretion of the district court and thus its decision should be affirmed. *Wetzel, supra* 508 F. 2d at 253; *Brown* v. *United States,* 508 F. 2d 618, 627 (3d Cir., 1974); *Carey* v. *Greyhound Bus Co.,* 500 F. 2d 1372, 1380 (5th Cir., 1974).

For the foregoing reasons, we believe that the district court did not err in concluding that the class included all recoupment cases rather than merely "waiver" cases. While "waiver" and "reconsideration" cases require somewhat differing legal analysis, as we note *infra,* they are not so different that the district court committed reversible error in treating the class as a single large class encompassing all recoupment cases. Furthermore, as indicated above it does not appear that the Secretary, in his motion in opposition to plaintiff's motion for a class action in the district court, raised the contention that the class order, if granted, should be limited solely to "waiver" cases. Under these circumstances, we cannot conclude that the district court erred in defining the class as broadly as it did.[18]

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[17] See note 14, *supra.*

[18] Thus, we need not decide whether, on the facts of this case, plaintiff sought only "waiver" of recoupment.

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V. The Merits[19]

A

[8] The chief precedent upon which plaintiff relies is *Goldberg* v. *Kelly, supra.* In that case, the Supreme Court held that due process requires that welfare officials provide notice and an oral hearing prior to any termination of benefits. The Court relied heavily on the welfare recipients' "brutal need" for continued payments. A "crucial factor," in its view, was that "termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits." Adopting a balancing test, the Court concluded that "the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in fiscal and administra-

[19] In addition to holding that due process required an oral hearing prior to the recoupment of benefits, the district court concluded that *ex parte*, summary decisions on recoupment are contrary to the "purpose" of the Social Security Act. This conclusion as to the Act's "purpose" was dictum, however, since the district court stated that mandamus jurisdiction would require a showing that the Secretary was under a clear, non-discretionary duty, which in turn depended upon an analysis of the due process issue. 377 F.Supp. at 916–17. We agree that mandamus jurisdiction cannot rest on something as nebulous as an act's "purpose," at least where the act, as here, does not by its terms require a hearing. In any event, we question whether the mere fact that the "purpose" of the Act may be "compassionate" can be any basis for concluding that its purpose can be furthered only by requiring oral pre-recoupment hearings. But *cf. California Dept. of Human Resources Development* v. *Java*, 402 U.S. 121, 91 S.Ct. 1347, 28 L.Ed.2d 666 (1971).

tive burdens." *Goldberg, supra,* 397 U.S. at 266, 90 S.Ct. at 1019.

The Secretary, however, contends that *Goldberg* is distinguishable and that it must be read in the light of subsequent decisions which have further refined the requirements of due process. The Secretary's first argument is that, except in most unusual circumstances as evidenced by *Goldberg* v. *Kelly*, the Supreme Court has not required oral evidentiary hearings prior to a deprivation of a property interest where the preliminary pre-deprivation proceedings are sufficient to establish the "probable validity" of the administrative claim. Pointing to its procedures providing for an initial determination and a reconsideration, coupled with the right to submit written responses and documentary proof, the Secretary contends that the pre-recoupment procedure followed by the Social Security Administration is sufficient to establish the "probable validity" of a decision to recoup, and that a *post*-recoupment oral hearing therefore satisfies due process. We see several basic problems with this analysis, however.

First, the Secretary relies primarily on a line of cases which, while having some relevance on the issue, did not purport to overrule or modify *Goldberg* and are not controlling here. *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 94 S. Ct. 1895, 40 L. Ed. 2d 406 (1974); *Fuentes* v. *Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L. Ed. 2d 556 (1972); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969). Of these three decisions, only *Mitchell* indicated that "probable validity" may be determined in the absence of a prior oral hearing; *Fuentes* and *Sniadach*, in fact, required prior oral hearings. Thus, *Mitchell*, rather than *Goldberg*, represents the excep-

tion to the rule. Also, those three cases, unlike *Goldberg*, involved creditors' *ex parte* seizure of property belonging to debtors,[20] and thus present somewhat different legal considerations than state termination or reduction of benefits under social welfare programs. At no point did the Court in *Mitchell* indicate that *ex parte* proceedings to determine "probable validity" were permissible outside of the creditor/debtor context. In *Goldberg*, the Supreme Court considered a state welfare procedure in which a claimant had a right, after being interviewed by his caseworker and prior to termination of benefits, to receive a written explanation of the reasons for termination and to submit written information in rebuttal. He also had a right to a full oral hearing *after* termination. 397 U.S.

[20] The Secretary also cites *Bell* v. *Burson*, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971), but that case is not on point, since the Court there, as in *Fuentes* and *Sniadach*, held that some kind of hearing was required before the revocation of a driver's license. While it said that the purpose of the hearing was only to determine the "reasonable possibility" of the driver's wrongful conduct, and while it left the scope of such a hearing undefined, it still required an *oral* hearing prior to revocation. See footnote 31 *infra*.

The Secretary also cites *Arnett* v. *Kennedy*, 416 U.S. 134, 94 S. Ct. 1633, 40 L. Ed. 2d 15 (1974), but that case contained five separate opinions, none of which represented a majority view. Only three Justices (Powell, Blackmun and White) indicated that an *ex parte* determination of "probable validity" might satisfy due process in the context of employee discharges. The plurality opinion held that there was no due process right to a hearing prior to discharge, because the "property interest" involved, unlike those in *Goldberg*, *Bell* and *Sniadach*, "was itself conditioned by the procedural limitations which had accompanied the grant of that interest." *Id.* at 155, 94 S. Ct. at 1645. Consequently, the plurality held that there was no claim of entitlement to the job. However, a majority of the Court rejected the plurality's view. *Id.* at 166–67, 94 S. Ct. 1633 (Powell, J., concurring), and 211, 94 S. Ct. 1633 (Marshall, J., dissenting).

at 258–60, 90 S. Ct. 1011. The Court, however, held that this procedure was insufficient and required an oral hearing prior to termination. Since the procedure invalidated in *Goldberg* would seem to be at least as effective in ensuring "probable validity" as the procedure used here,[21] and since the Court in *Mitchell* did not purport to modify *Goldberg*, we refuse to extend the reasoning of *Mitchell* outside the creditor/debtor context and to permit *ex parte* determination of "probable validity" in social welfare cases.

Furthermore, even if *Mitchell's* "probable validity" analysis were applicable to social welfare cases, the procedure here may not pass muster. The Supreme Court summarized this approach in *Mitchell, supra*, 416 U.S. at 611, 94 S. Ct. at 1902, by stating that *Sniadach* and *Fuentes*

> merely stand for the proposition that a hearing must be had before one is finally deprived of his property and do not deal at all with the need for a pretermination hearing where a full and *immediate* post-termination hearing is provided. (Emphasis added.)

The Court upheld the Louisiana sequestration statute challenged in *Mitchell* partly because it provided for an immediate hearing after the writ issued. *Id.* at 618, 94 S. Ct. 1895.[22] Thus, the constitutionality of a proce-

[21] Both procedures permit written submissions and documentary proof, but the procedure here, unlike the one invalidated in *Goldberg*, does not require a Government official to discuss the case with the beneficiary in person prior to a decision to recoup. See 397 U.S. at 258, 90 S. Ct. 1011.

[22] The Court in *Mitchell*, noted that the Florida statute invalidated in *Fuentes* provided the buyer with a right to a hearing only "eventually," and that under the Pennsylvania statute invalidated in the same case, a buyer may never get a hearing. *Mitchell, supra* at 615–16, 94 S. Ct. 1895.

dure establishing "probable validity" without a full oral hearing prior to the property deprivation may depend in part on whether there is an immediate right to an oral hearing afterward.[23] As we noted previously, however, there seems to be a delay of several months from the time recoupment has begun to the time a recipient is provided a hearing.

Finally, if the Secretary's pre-recoupment procedures are to be upheld on the ground that they are sufficient to determine "probable validity," they would have to be effective in minimizing the risk of an erroneous determination. See *Mitchell, supra* at 618, 94 S. Ct. 1895; *Arnett* v. *Kennedy,* 416 U.S. 134, 94 S. Ct. 1633 (1974), at 170, 94 S.Ct. 1633 (Powell, J., concurring) and 188, 94 S. Ct. 1633 (White, J., concurring in part and dissenting in part). However, the Secretary's own figures undercut his contention that the procedures at issue here are effective to minimize erroneous decisions to recoup.[24] In 1970, the only year from which figures have been made available to us, over

[23] Similarly, the recent Supreme Court decision in North *Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601, 95 S. Ct. 719, 42 L. Ed. 2d 751 (1975), distinguished *Mitchell* in part because the Georgia garnishment statute, unlike the Louisiana sequestration statute upheld in *Mitchell*, did not provide for an immediate hearing. *Id.* at 4194. See also *Fusari* v. *Steinberg*, 419 U.S. 379, 386. 95 S. Ct. 533, 42 L. Ed. 2d 521 (1975), where the Supreme Court indicated that the length of the period of deprivation of benefits and the rapidity of administrative review were important factors bearing on the constitutionality of termination procedures.

[24] We also note that pre-recoupment procedures lack some of the institutional safeguards that the Court in *Mitchell* indicated were important, such as the requirements that the party seeking the writ file an affidavit setting forth specific facts and that the pre-deprivation decision be made by a neutral magistrate.

one-third of all persons seeking a post-recoupment hearing (560 out of 1600) obtained reversals.[25]

[9] Therefore, because of a combination of factors—the fact that the Supreme Court has given no indication that *Mitchell's ex parte* "probable validity" approach is applicable outside the creditor/debtor context, and that such an approach appears to have been at least implicitly rejected in *Goldberg* v. *Kelly*; the substantial delay between the initiation of recoupment and an oral hearing; and the significant reversal rate following post-recoupment hearings—we conclude that the pre-recoupment procedures cannot be defended on the ground that they are sufficient to establish the "probable validity" of the determination in question.

The Secretary also seeks to distinguish *Goldberg* by arguing that the impact of a termination of welfare benefits is more severe than a recoupment of a social security overpayment, since welfare recipients, unlike social security beneficiaries, are by definition destitute and since a beneficiary, whose payments have merely been reduced, is still obtaining some assistance. *Goldberg*, as noted previously, rested in large part on welfare recipients' "brutal need" for continued payments, noting that "[t]he extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss.'" *Goldberg, supra*, 397 U.S. at 262–63, 90 S.Ct. at 1017, quoting *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 168, 71 S. Ct. 624, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring). The Secretary also relies on *Torres* v. *New York State*

[25] The Secretary's figures, however, make no distinction between "reconsideration" and "waiver" cases.

Dept. of Labor, 321 F. Supp. 432 (S.D.N.Y.1971), *vacated and remanded,* 402 U.S. 968, 91 S. Ct. 1685, 29 L. Ed. 2d 133 (1971), *adhered to,* 333 F. Supp. 341 (S.D.N.Y.1971), *affirmed,* 405 U.S. 949, 92 S. Ct. 1185, 31 L. Ed. 2d 288 (1972), in which the Supreme Court affirmed without opinion a three-judge district court decision, which had held that a state may deny a claim for unemployment insurance without a prior oral hearing since the denial of unemployment compensation does not necessarily result in severe economic harm to the claimant.[26]

Since *Goldberg* and *Torres,* however, the Supreme Court has indicated, though not with complete consistency, that the requirements of due process do not depend on the severity of the impact resulting from the deprivation. In *Fuentes, supra* at 88–89, 92 S. Ct. at 1998, the Court rejected the contention that *Goldberg* carved out a rule of "necessity," and stated that that decision was "in the mainstream of past cases, having little or nothing to do with absolute 'necessities' of life but establishing that due process requires an opportunity for a hearing before a deprivation of property takes effect." The Court in *Fuentes* relied in part on *Bell* v. *Burson,* 402 U.S. 535, 91 S. Ct. 1586, 29

[26] Plaintiff seeks to discount the precedential effect of *Torres* by pointing to language in *Fusari, supra,* indicating that a summary affirmance affirms only the result and not the reasoning of the lower court. However, since we see no way in which *Torres* and *Goldberg* are distinguishable on the due process issue other than by comparing the severity of the impact, we believe that the Supreme Court's summary affirmance should be construed as an acceptance of this distinction, at least to the extent that *Torres* is given any precendential weight. Compare *Doe* v. *Hodgson,* 478 F. 2d 537, 539 (2d Cir. 1973), with *Edelman* v. *Jordan,* 415 U.S. 651, 670–71, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974), and *Dillenburg* v. *Kramer,* 469 F. 2d 1222, 1225 (9th Cir. 1972).

L. Ed. 2d 90 (1971), which had held that there must be an opportunity for a hearing on the issue of fault before "mere" suspension of a driver's license. The Court in *Fuentes* observed that drivers' licenses were not "necessities" like welfare or wages, but were nevertheless sufficiently important to be entitled to protection under due process. More recently, in *Mitchell, supra,* 416 U.S. at 610, 94 S. Ct. 1895, the Supreme Court seemed to retract somewhat by indicating that one of the factors to take into account, in deciding whether a prior hearing was required, was the impact of the deprivation.

In its most recent pronouncements, however, the Supreme Court has indicated that severity of impact is not a prerequisite. In *North Georgia Finishing, supra,* the Court reaffirmed much of the *Fuentes* analysis (419 U.S. at 605, 95 S. Ct. 719), and held that commercial establishments have the same due process rights as consumers (419 U.S. at 606, 95 S. Ct. 719). Furthermore, in *Goss* v. *Lopez,* 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975), the Supreme Court held that due process requires an oral hearing prior to disciplinary suspensions from school. In rejecting the school board's argument that a prior hearing was not required because students suspended for ten days did not suffer "grievous loss," the Court stated:

> "Appellee's argument is again refuted by our prior decisions; for in determining 'whether due process requirements apply in the first place, we must not look to the "weight" but to the *nature* of the interest at stake.' *Board of Regents* v. *Roth, supra,* [408 U.S.] at 570–71 [92 S. Ct. 2701, at 2705–2706, 33 L. Ed. 2d 548]. Appellees were excluded from school only temporarily, it is true, but the length and consequent severity of a deprivation, while another factor to weigh

> in determining the appropriate form of hearing, 'is not decisive of the basic right' to a hearing of some kind. *Fuentes* v. *Shevin*, 407 U.S. 67, 86 [92 S. Ct. 1983, 1997, 32 L. Ed. 2d 556] (1972). The Court's view has been that as long as a property deprivation is not *de minimis*, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause. *Goss, supra* at 575, 95 S. Ct. at 737."

[10] We therefore believe that we are constrained by Supreme Court's most recent pronouncements not to base our decision on our perception of the severity of the impact of recoupment on social security recipients, provided we determine that the impact is not *de minimis*. The impact in this case is surely more than *de minimis*, since we believe that Congress, in enacting a program providing disabled widow's benefits, recognized that recipients like Mrs. Mattern were in need of assistance. We also note that the facts of this case indicate that Mrs. Mattern was both disabled and without any other source of income.[27]

We are aware of the recent Second Circuit decision, *Frost* v. *Weinberger*, 515 F. 2d 57 (2d Cir. 1975), but decline to follow it. First, we note that that decision is distinguishable in several respects. At issue in *Frost* was whether a hearing was required before a reduction in benefits to surviving legitimate children. Such a reduction was required because of the competing claims of illegitimate children of the wage earner

[27] The "Refund Questionnaire" which plaintiff filled out stated that she had no other source of income besides her monthly disability check (54a). We observe, however, the Refund Questionnaire was dated August 7, 1972, and there is the possibility that plaintiff could have applied for, and received, welfare payments since that date.

and because of the statutory ceiling on total payments allowable. 42 U.S.C. § 403(a) (1970). Thus, as the court in *Frost* noted, the controversy was not so much one between the Government and beneficiaries as between two groups of beneficiaries, with the Social Security Administration having "no financial stake" and being "totally disinterested as between the two sets of claimants." Unlike *Goldberg*, therefore, where the only interest conflicting with that of the plaintiffs was the Governmental interest in protecting its resources, in *Frost* there were "important private interests as well," *i.e.*, the interest of the illegitimate children to promptly receive payments to which they were entitled. Such a competing private interest, of course, is not present here. Furthermore, the court in *Frost* noted that the type of hearing that would be required would place unusual burdens on the Social Security Administration because of the possibility that legitimate and illegitimate children, all of whom would have to be present or represented at a hearing might be living in different areas. The court further noted that "a paternity hearing may demand an inquiry into the habits of a father long before married or long after his departure from the matrimonial household." These factors convinced the court in *Frost* that a paternity hearing would be less prompt and more protracted than the brief hearings likely to arise in welfare-termination cases, and thus the court concluded that those factors cut "in favor of allowing the SSA to act preliminarily on the basis of something less than a full-scale hearing." Those factors are not present here, and we believe that the hearings are likely to be as simple as those in welfare termination cases.

We also note that the court in *Frost* relied heavily on the analysis that a prior oral hearing was required only in cases where the deprivation was severe.[28] As we stated earlier, however, we do not read the post-*Goldberg* decisions as making due process requirements turn on the severity of the impact. The opinion in *Frost* nowhere mentioned the Supreme Court decisions in *Bell* v. *Burson, Fuentes* v. *Shevin, North Georgia Finishing* or *Goss* v. *Lopez,* which we read as requiring prior hearings wherever the impact is more than *de minimis*. The court in *Frost* relied heavily on *Arnett* v. *Kennedy, supra,* but as we observed previously (*see* note 19 *supra*), that decision presented five separate opinions, each offering different rationales and none representing a majority view. Only three of the Justices (Powell, Blackmun and White) indicated that the right to a hearing would turn, at least in

[28] We note this language in the *Frost* case:

"The Court's decisions can be fairly summarized as holding that the required degree of procedural safeguards varies directly with the importance of the private interest affected and the need for and usefulness of the particular safeguard in the given circumstances and inversely with the burden and any other adverse consequences of affording it.

"... An element crucial to *Goldberg* was that the benefits at issue were awarded on the basis of need and represented the last source of income available to the families. The benefits here at issue are not based upon need; .... [pp. 66–67 of 515 F. 2d]

"... [I]n cases where a reduction in such benefits would place a family below the subsistence level, other forms of government assistance would become available, however, unattractive resort to them may be. The weights in favor of departing from the ordinary principle that something less than a full-scale evidentiary hearing suffices *before* administrative action, when a full hearing is provided promptly thereafter, are thus substantially less than in *Goldberg* [p. 67 of 515 F.2d]"

part,[29] on the severity of the impact. 416 U.S. at 169, 94 S. Ct. 1633 (Powell, J., concurring) and 201–02, 94 S. Ct. 1633 (White, J., concurring in part and dissenting in part). Given the fact that a majority of the Court in *Arnett* did not employ the rational adopted in *Frost,* we continue to adhere to our reading of *Bell,*

[29] We note that in *Arnett*, the separate opinions of Justices Powell (with whom Justice Blackmun joined) and White did not rely solely on the fact that they perceived the impact on a discharged Government worker to be less severe than that on a welfare recipient whose benefits have been terminated. Justice Powell also relied on the potential disruption to Government efficiency and morale if the Government were required to retain a disruptive or otherwise unsatisfactory employee pending a hearing, 416 U.S. at 168, 94 S.Ct. 1633, a factor which, of course, is not present in this case. Justice White likewise placed several factors in the balance, 416 U.S. at 190, 94 S.Ct. 1633. One of them was the risk that the initial deprivation may be wrongful. In fact, this was essentially the reason he dissented in part. (The fatal defect, in his view, was the lack of an impartial hearing examiner). As we noted earlier, the significant reversal rate in recoupment cases after a hearing is empirical evidence that there is indeed a serious risk that the initial deprivation may be wrongful. Also, if the Government must continue to pay a worker pending a hearing, those payments cannot be recovered even if the Government should prevail. 416 U.S. at 193, 94 S.Ct. 1633. Here, however, the Social Security Administration, if it prevails at the hearing, should be able to recoup the full amount of the overpayment (provided the claimant does not die before the completion of recoupment).

Finally, we believe that if *Arnett* is construed to have turned on the fact that a discharged Government employee did not suffer a sufficiently serious deprivation, that decision must necessarily have overruled *Perry* v. *Sindermann*, 408 U.S. 593, 603, 92 S.Ct. 2694, 33 L.Ed. 2d 570 (1972), a result which none of the Justices in the *Arnett* majority purported to accomplish. A college professor who has a de facto claim to tenure and who is entitled to a hearing under *Perry* is no more reduced to a state of "brutal need" by the nonrenewal of his contract than is a discharged OEO civil servant.

Fuentes, North Georgia Finishing and *Goss* v. *Lopez.* We also note that two other Circuits have concluded that due process requires a hearing in cases involving termination of social security payments. *Eldridge* v. *Weinberger,* 493 F. 2d 1230 (4th Cir. 1974), *aff'g* 361 F. Supp. 520 (W.D. Va. 1973), *cert. granted,* 419 U.S. 1104, 95 S. Ct. 773, 42 L. Ed. 2d 800 (1975); *Williams* v. *Weinberger,* 494 F. 2d 1230 (5th Cir. 1974), *aff'g* 360 F. Supp. 1349 (N.D. Ga. 1973).

B

Another contention raised by the Secretary is more convincing. This argument is that recoupment cases present issues which are well adapted to resolution by written submissions and documentary proof. Consequently, he argues, an oral hearing would be superfluous and should not be constitutionally required. As we will explain in greater detail below, the applicability of this argument to recoupment cases necessitates a discriminating analysis of the different types of cases and of the different types of factual disputes likely to arise. However, we do accept the Secretary's basic premise that due process should not require a pre-recoupment oral hearing where factual disputes are as well suited to resolution by documentary proof and written submissions as by oral hearings.

Implicit in *Goldberg* v. *Kelly* is the recognition of the fact that issues likely to arise in welfare termination cases can only be resolved through an oral hearing. One of the plaintiffs was a woman whose benefits had been terminated because she allegedly failed to cooperate with welfare officials in suing her estranged husband. Another was a man whose benefits were terminated because he refused to accept drug counseling and rehabilitation, though he claimed that he did not

in fact use drugs. *Goldberg, supra,* 397 U.S. at 256 n. 2, 90 S. Ct. 1011. It is obvious that resolution of those factual disputes could only be made at an oral hearing, where the trier of fact could evaluate the credibility of the claimant. As the Court noted, "where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision." *Id.* at 269, 90 S. Ct. at 1021.

Similarly, in *Goss* v. *Lopez, supra,* the question of whether a student had engaged in disruptive conduct justifying suspension could not possibly be determined without an oral hearing. See also *Bell* v. *Burson, supra,* which required an oral hearing to determine fault before revocation of a driver's license. By contrast, the Supreme Court in *Mitchell* held that no prior opportunity whatsoever need be given the debtor to oppose repossession of his property, in part because the issue "turns on the existence of the debt, the lien, and the delinquency," which "are ordinarily uncomplicated matters that lend themselves to documentary proof." *Id.* 416 U.S. at 609, 94 S. Ct. at 1901. Thus, "[t]he nature of the issues at stake minimize the risk" of an erroneous *ex parte* determination. *Id.* at 609–10, 94 S. Ct. at 1901. See also *Burr* v. *New Rochelle Municipal Housing Authority,* 479 F. 2d 1165, 1169 (2d Cir., 1973), where the court stated that an oral hearing was not required prior to deciding whether to increase the rents of public housing tenants, since "the opportunity to present oral evidence is not particularly valuable where technical financial data is at issue."

[11] Application of the above principle to recoupment cases is more complex. As noted previously, the Secretary draws a distinction between "reconsideration" and "waiver" cases, arguing that they present

somewhat different legal issues. We agree with the Secretary that "reconsideration" cases are generally well suited to resolution by documentary proof, and that claimants in most cases of this type are not constitutionally entitled to a prior oral hearing.[30] Most of these disputes involve matters of a purely arithmetical nature—whether the computation of an earnings statement is correct; whether a computer's calculation of the amount of benefits received is accurate; whether two benefit checks have been received rather than one. In such circumstances, an examination of social security records and cancelled checks would seem to be sufficient, and it is hard to see how an oral hearing would be of much benefit to the claimant. Consequently, the Secretary's pre-recoupment procedures permitting written evidence and providing for an examination of written documents, when coupled with a right to a *post*-recoupment oral hearing, satisfy due process.

We add one *caveat,* however. Because we cannot envision all the situations in which "reconsideration" cases are likely to arise, we acknowledge the possibility that there may be cases where the opportunity to appear in person might be important in making an

[30] We decline to establish a flat rule that *all* "reconsideration" cases may be decided prior to recoupment without an oral hearing, since we do not have sufficient basis for knowing all the types of cases which the Secretary may classify as being of the "reconsideration" type. The crucial distinction is not whether the cases are labeled "reconsideration" or "waiver," but whether they lend themselves to resolution by documentary proof. Thus, while we shall use those terms as suggested by the Secretary for purposes of convenience, we do not mean to imply that the constitutionality of recoupment in a particular case is dependent upon the label used nor that we necessarily accept the Secretary's categorizations *in toto.*

accurate determination. Thus, while many "reconsideration" cases can be decided without a prior oral hearing, we believe that, as a matter of due process, the Secretary should establish procedures which would provide for an oral hearing where a case does not hinge on documentary evidence and where a claimant raises issues which necessitate an evaluation of his credibility. We are mindful of the concern expressed in *Goldberg* that many claimants lack the education or ability to frame written submissions in a persuasive light, and thus if a claimant in a "reconsideration" case *raises* such an issue, he should be entitled to a hearing.

If, however, a claimant merely denies receiving duplicate checks or claims that his earnings were of a certain amount, cancelled checks bearing his endorsement or earnings records maintained by the social security office would seem to constitute hard proof incapable of oral rebuttal. In this case, for example, if plaintiff had merely denied receiving the $1,063.80 check or had claimed that the check did not represent an overpayment, she would not have been constitutionally entitled to a hearing prior to recoupment. A cancelled check bearing her endorsement would be persuasive proof that she had received and cashed it, and the date of issue, coupled with the statutory six-month waiting period, would be persuasive proof that the check represented an overpayment. Furthermore, the plaintiff in this case, though given the opportunity to do so, came forth with no written evidence to support a contention that she had not in fact been paid $1,063.80 or that that check did not represent an overpayment. Consequently, if she had made solely those contentions, it is hard to see how a pre-recoupment oral hearing would be helpful. In all cases, however,

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a claimant should be informed, prior to initiation of recoupment, of the basis on which an adverse determination is made and should be offered the opportunity to explain or rebut any written evidence against her.

[12] With respect to "waiver" cases, the Secretary admits that resolution of factual disputes is more complex than in "reconsideration" cases, but offers essentially two reasons why pre-recoupment oral hearings in such cases should not be constitutionally required. First, relying on *Board of Regents* v. *Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972), and *Perry* v. *Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972), he argues that a recipient has no "claim of entitlement" to an overpayment and thus the due process clause "does not require the Secretary—in deciding to make a gift of funds improperly received by the beneficiary—to also stay his hand pending a hearing" on the waiver request (Br. at 24). We reject this analysis. Section 204(b) of the Act [31] gives a recipient of an overpayment a statutory right not to have his payments reduced under certain enumerated circumstances (if he is without fault, etc.), and in "waiving" recoupment the Secretary is not merely making a "gift," but is complying with the statute.[32] Thus, the fact that plaintiff may not have been entitled to receive the overpayment does not mean that she has no claim of entitlement to retain it (or at least to receive a full amount of her future monthly payments).

[13] The Secretary also contends that "waiver" cases, like "reconsideration" cases, lend themselves to

[31] *See* note 1 *supra*.

[32] The statute does not make "waiver" discretionary, but rather uses mandatory language: "*there shall be no*" recoupment under the conditions specified.

resolution by documentary proof. We disagree. One of the factors to be considered in a "waiver" case is whether the claimant is "without fault," and the Supreme Court has clearly indicated that determinations as to fault must be made at an oral hearing.[33] The facts of this case graphically illustrate the need for an oral hearing. In determining that plaintiff was not without fault, the Secretary relied on basically two factors—its records indicating that plaintiff had been informed of the overpayment by telephone, and its letter of January 28, 1972. Plaintiff denies that she received such a phone call, and we do not see how resolution of this factual dispute could possibly be made without allowing her to tell her story in person and enabling a trier of fact to evaluate her credibility. Similarly, a finding of fault could not rest on the ambiguous January 28 letter, at least without giving plaintiff an opportunity to explain in person what she thought it meant.[34] Another requirement that a claimant in a waiver case must meet is that recoupment would

[33] Cf. *Mitchell*, *supra*, at 416 U.S. 617, 94 S. Ct. at 1905, where the Supreme Court in discussing and distinguishing *Fuentes*, said:

"As in *Bell* v. *Burson*, where a driver's license was suspended without a prior hearing, when the suspension was premised on a fault standard, . . . in *Fuentes* this fault standard for replevin was thought illsuited for preliminary *ex parte* determination."

[34] That letter told her that a special check in the amount of $1063.80 was being mailed to her, and proceeded to say:

"We have taken steps to avoid duplication of payment. However, should you receive more than one check because of these dual actions, please return one of them to the social security district office immediately."

(51a). We believe it is perfectly reasonable for plaintiff to have believed that this letter was referring to the possibility that she might receive two $1063.80 checks. Since she only received one such check, we do not see how a finding of fault can be based on this letter.

either frustrate the purposes of the Act or be against equity and good conscience. As defined by the Secretary's regulations, these terms refer to such matters as difficulty in meeting necessary living expenses or a change of position by the recipient.[35] We do not see how a resolution of such questions can reliably be determined in the absence of oral testimony.

While we believe that claimants in "waiver" cases have a constitutional right to a pre-recoupment oral hearing, that right may not attach in all cases. Where a claimant in a "waiver" case raises no disputed issue of fact, or where, accepting his version of the facts as true, we could say as a matter of law that he was not entitled to retain the overpayment, then again it is hard to see how a pre-recoupment hearing would be of benefit.[36] Thus, the constitutional requirement of a hearing may be limited to some extent by principles analogous to summary judgment in civil litigation. See *Mills* v. *Richardson,* 464 F. 2d 995, 1001 (2d Cir., 1972). For example, if plaintiff in this case had admitted receiving a telephone call telling her that the impending $1,063.80 check was in error and that she should return it, and if she merely alleged hardship, then as a matter of law, she would not be without fault and the recoupment could proceed in advance of an oral hearing. The reason for this is that, under section 204(b) of the Act, a claimant seeking to waive recoupment must establish two things: that he is without fault *and* that the recoupment would defeat the purpose of the Act or be against equity and good conscience. Thus, if plaintiff's written response had conceded one of these two elements, she would have no legal right to retain the overpayment.[37]

[35] *See* notes 3 and 4 *supra.*

[36] The Supreme Court explicitly left open this issue in *Goldberg, supra* 397 U.S. at 268 n.15, 90 S.Ct. 1011.

C

[14] In sum, we conclude that the recoupment procedure established by the Secretary is constitutionally deficient in that it does not provide for pre-recoupment oral hearings in the situations we have indicated are necessary. We do not believe that due process requires pre-recoupment oral hearings in all cases, but the Secretary's existing procedure makes no distinction between the various types of cases and issues that are likely to arise. To the extent that a hearing is required, we agree with the district court that the full panoply of procedural safeguards need not be provided and that the pre-recoupment hearing need not take the form of a judicial or quasijudicial trial. In *Richardson* v. *Perales,* 402 U.S. 389, 399–401, 91 S. Ct. 1420, 1426, 28 L. Ed. 2d. 842 (1971), the Court has explained the informal nature of social security hearings in this language:

> The Social Security Act has been with us since 1935. Act of August 14, 1935, 49 Stat. 620. It affects nearly all of us. The system's administrative structure and procedures, with essential determinations numbering into the millions, are of a size and extent difficult to comprehend. But, as the Government's brief here accurately pronounces, "Such a system must be fair—and it must work."
>
> "Congress has provided that the Secretary "'shall have full power and authority to

[37] Furthermore, like the district court, we conclude that a hearing is not required where the claimant has made a knowing, intelligent and voluntary waiver of the right.

make rules and regulations and to establish procedures . . . necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder.' § 205(a), 42 U.S.C. § 405(a)."

"From this it is apparent that (a) the Congress granted the Secretary the power by regulation to establish hearing procedures; (b) strict rules of evidence, applicable in the courtroom, are not to operate at social security hearings so as to bar the admission of evidence otherwise pertinent; and (c) the conduct of the hearing rests generally in the examiner's discretion. There emerges an emphasis upon the informal rather than the formal. This, we think, is as it should be, for this administrative procedure, and these hearings, should be understandable to the layman claimant, should not necessarily be stiff and comfortable only for the trained attorney, and should be liberal and not strict in tone and operation. This is the obvious intent of Congress so long as the procedures are fundamentally fair."

[15, 16] We therefore believe that due process requires only an informal, oral hearing which provides the following safeguards:[38]

1) an impartial decision maker separated from those making the previous administrative determinations in the case;[39]

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[38] We note with approval the type of procedure followed in *Brower* v. *Wohlgemuth*, 371 F.Supp. 863 (E.D. Pa. 1974).

[39] In *Twigger* v. *Schultz*, 484 F. 2d 856, 859 (3d Cir. 1973), Judge Gibbons pointed out:

"A more reasonable construction of the entire Act, which we adopt, is that there may be presiding officers other than those listed in § 7(a), but that the procedural safeguards of the Act, and specifically the separation of functions safeguard of § 5(c), apply to such presiding officers to the same extent as to those presiding officers listed in § 7(a)."

See also *Withrow* v. *Larkin*, —— U.S. ——, 95 S. Ct. 1456, 1464–1468, 43 L. Ed. 2d 712 (1975).

Due process does not require that the decision maker be an administrative law judge appointed under 5 U.S.C. § 3105 for "proceedings required to be conducted in accordance with" 5 U.S.C. §§ 556 and 557. Of course, statutory criteria exceeding due process requirements are nevertheless controlling as to the credentials of the presiding administrator.

[40] The presiding administrator's decision must rest solely on the evidence adduced at the hearing, in conformance with the hearing rules for receiving evidence. See *Richardson* v. *Perales*, *supra*, 402 U.S. at 400, 91 S. Ct. 1420; *Goldberg* v. *Kelly*, *supra*, 397 U.S. at 271, 90 S. Ct. 1011. The report "need not amount to a full opinion or even formal findings of fact and conclusions of law." *Goldberg* v. *Kelly* at 271, 90 S. Ct. at 1022.

[41] Such report could be submitted in draft form to all concerned for comment before final adoption.

2) timely and adequate notice to the recipient of the reasons for recoupment;

3) an effective opportunity for the recipient to confront and cross-examine adverse witnesses;

4) an effective opportunity for the recipient to present his own arguments and evidence orally;

5) an opportunity to retain counsel or have the informal assistance of a friend, if the recipient desires;

6) a report written by the decision maker which informally states the reasons and the evidence relied on in reaching his decision;[40]

7) an opportunity for all parties to receive and challenge the decision maker's report before it becomes final.[41]

See *Goldberg* v. *Kelly, supra,* 397 U.S. at 267–71, 90 S.Ct. 1011.

Although we are in partial agreement with the district court decision, we believe that the judgment of the district court should be vacated and remanded so that the district court can enter a new order defining the class in light of our ruling on the merits and in light of any further developments which have occurred since the final class determination on June 10, 1974.

Accordingly, the judgment of the district court will be vacated and the case remanded for entry of an appropriate judgment in accordance with this opinion.

APPENDIX C

In The United States District Court For The Eastern District of Pennsylvania

(Civil Action No. 72–2522; April 30, 1974)

ARLENE M. MATTERN

v.

CASPAR WEINBERGER, UNITED STATES SECRETARY OF HEALTH, EDUCATION, AND WELFARE

Opinion and Order

TROUTMAN, J.

This action challenges the procedure utilized by the Secretary of Health, Education, and Welfare [the Secretary], pursuant to Section 204 of the Social Security Act [the Act], to adjust or reduce social security benefits in order to recoup an alleged overpayment. Specifically, plaintiff, on behalf of herself and others similarly situated, seeks injunctive and declaratory relief, requiring the Secretary to conduct an evidentiary hearing prior to adjusting or reducing social security benefits to which plaintiff is entitled under Title II of the Act. 42 U.S.C. § 401 *et seq.* Plaintiff challenges the failure to provide an oral hearing prior to the recoupment of an alleged overpayment on the grounds that it is contrary to the purpose of the Act and violative of the Fourteenth Amendment to the Constitution. Presently before the Court are (1) defendant's motion to dismiss the

complaint for lack of jurisdiction, (2) plaintiff's motion for a class action determination, (3) plaintiff's motion to convene a three-judge court and (4) cross-motions for summary judgment.

The relevant facts are not in dispute and are as follows: Plaintiff, at the time this action was filed, was fifty-three years old and is presently disabled. In 1971, she filed an application for disabled widow's benefits pursuant to 42 U.S.C. §402(e)(1)(B)(ii) on the social security earnings record of her deceased husband. Her application was initially denied, but, upon reconsideration, she was found entitled to benefits effective December 1971.[1] Thereafter, plaintiff informed the social security office that she was in financial distress. Upon investigation, the office forwarded a request for a critical case payment to the Philadelphia payment center on the basis of plaintiff's alleged condition of hardship. The payment center failed to consider the statutory waiting period and erroneously certified payment of monthly benefits retroactive to May 1971 rather than December 1971. A check in the amount of $1063.80 was issued to plaintiff. Prior to the receipt of this check, plaintiff received another check in the amount of $119.30, representing her monthly entitlement. According to defendant, plaintiff was notified that the special check for $1063.80 was in error and should be returned.

Upon plaintiff's failure to return the check, she was notified of the alleged over-payment and the Secre-

[1] It was determined that plaintiff established a period of disability beginning on May 18, 1971. She was not entitled to benefits as of that date, because the Act, at that time, provided for a six-month waiting period between the onset date and entitlement to benefits. The Act, as amended in 1972, provides for a five-month waiting period. 42 U.S.C. § 423(c)(2).

tary's intent to adjust or reduce the amount of her monthly check in order to recoup the overpayment. Plaintiff, thereafter requested waiver of the recovery action and completed a "without fault" questionnaire. In her response, plaintiff admitted receiving the check for $1063.80, which she cashed to pay her bills, but denied the receipt of any notice that the check was not correct until she received the letter, indicating the Secretary's intent to recoup the over-payment. By letter dated October 20, 1972, plaintiff was advised that recovery of the overpayment could not be waived because she was not without fault and she was further advised of her right to request reconsideration of this determination. On November 20, 1972, plaintiff filed a request for reconsideration, and as a result of this request, the adjustment action was not implemented pursuant to Section 5503.5 of the Claims Manual. On December 29, 1972, plantiff commenced this civil action. Subsequently, the reconsideration decision upheld the initial determination on the ground that plaintiff was not without fault and, therefore, liable for recovery of the overpayment. In order to alleviate undue hardship, recovery by partial adjustment of $30 per month was recommended, commencing with her January 1973 benefit. As a result of this notice, the parties entered into a stipulation continuing plaintiff's full benefits until the disposition of this action.

Section 204 of the Act, 42 U.S.C. § 404, authorizes the Secretary, under regulations prescribed by him, to recover incorrect overpayments or to adjust benefits to provide for such recovery. Section 204 provides in pertinent part:

> (a) Whenever the Secretary finds that more or less than the correct amount of payment has been made to any person under this sub-

chapter, proper adjustment or recovery shall be made, under regulations prescribed by the Secretary, as follows:

(1) With respect to payment to a person of more than the correct amount, the Secretary shall decrease any payment under this subchapter to which such overpaid person is entitled, or shall require such overpaid person or his estate to refund the amount in excess of the correct amount, or shall decrease any payment under this subchapter payable to his estate or to any other person on the basis of the wages and self-employment income which were the basis of the payments to such overpaid person, or shall apply any combination of the foregoing. . . ."

(b) In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.

Under subsection (b) of Section 204, no adjustment or recovery shall be made where such person is without fault [2] and such adjustment or recovery would

[2] "Fault" is defined in 20 CFR § 404, 507 which provides:

" 'Fault' as used in 'without fault' (see §§ 404.506 and 405.355) applies only to the individual. Although the Administration may have been at fault in making the overpayment, that fact does not relieve the overpaid individual or any other individual from whom the Administration seeks to recover the overpayment from liability for repayment if such individual is not without fault. In determining whether an individual is at fault, the Administration will consider all pertinent circumstances, including his age, intelligence, education, and physical and mental condition. What constitutes fault (except for 'deduction overpayments'—see § 404. 510) on the part of overpaid individual or on the part of any other individual from whom the Administration seeks to recover the overpayment depends upon whether the facts show that the incorrect payment to the individual or to a provider of services or other person, or an incorrect payment made under section 1814(e) of the Act [42 U.S.C.A. § 1395f(e)], resulted from:

"(a) An incorrect statement made by the individual which he knew or should have known to be incorrect; or

"(b) Failure to furnish information which he knew or should have known to be material; or

"(c) With respect to the overpaid individual only, acceptance of a payment which he either knew or could have been expected to know was incorect."

defeat the purpose of Title II of the Act [3] or would be against equity and good conscience.[4]

[3] The phrase "defeat the purpose" of Title II is defined in 20 CFR § 404.508, which provides:

"(a) General. 'Defeat the purpose of title II [42 U.S.C.A. § 401 et seq.],' for purposes of this subpart, means defeat the purpose of benefits under this title, i.e., to deprive a person of income required for ordinary and necessary living expenses. This depends upon whether the person has an income or financial resources sufficient for more than ordinary and necessary needs, or is dependent upon all of his current benefits for such needs. An individual's ordinary and necessary expenses include:

"(1) Fixed living expenses, such as food and clothing, rent, mortgage payments, utilities, maintenance, insurance (e.g., life, accident, and health insurance including premiums for supplementary medical insurance benefits under title XVIII [42 U.S.C.A. § 1395 et seq.]), taxes, installment payments, etc.;

"(2) Medical, hospitalization, and other similar expenses;

"(3) Expenses for the support of others for whom the individual is legally responsible; and

"(4) Other miscellaneous expenses which may reasonably be considered as part of the individual's standard of living.

"(b) When adjustment or recovery will defeat the purpose of title II [42 U.S.C.A. § 401 et seq.]. Adjustment or recovery will defeat the purpose of title II [42 U.S.C.A. § 401 et seq.] in (but is not limited to) situations where the person from whom recovery is sought needs substantially all of his current income (including

See also 20 CFR § 404.506. 20 CFR § 404.901 *et seq.* of the Social Security Administration regulation sets forth a four-step administrative process by which a claimant may obtain review of a decision to adjust benefits in order to recoup an overpayment. Following an initial determination that an over-payment has been made and that there is no basis for waiver of recovery, the claimant may obtain reconsideration pursuant to 20 CFR 404.914. Subsequent to a reconsidered determination, an individual may request a hearing *de novo* before an administrative law judge, 20 CFR 404.917, and review by the Appeals Council of the Social Security Administration. 20 CFR 404.945. Thereafter, a claimant may seek judicial review in the district courts pursuant to § 205(g) of the Act. 42 U.S.C. § 405(g). During the period that a claimant is pursuing his administrative remedies, there is no provision in the Act or in the regulations, requiring that a hearing must be conducted prior to implementation of any adjustment or recovery. Section 5503.5 of the Claims Manual provides that where reconsideration of an initial determination is requested, "withholding to recoup the overpayment will be further deferred and

social security monthly benefits) to meet current ordinary and necessary living expenses."

[4] "Against equity and good conscience" is defined in 20 CFR § 404.509, which provides:

" 'Against equity and good conscience' means that adjustment or recovery of an incorrect payment (under title II or title XVIII [42 U.S.C.A. § 401 et seq. or § 1395 et seq.]) will be considered inequitable if an individual, because of a notice that such payment would be made or by reason of the incorrect payment, relinquished a valuable right (examples (1), (2) and (5) or changed his position for the worse (examples (3) and (4)). In reaching such a determination, the individual's financial circumstances are irrelevant."

payment will be continued" until a decision upon reconsideration is made. Thus, under the regulations and provisions of the Claims Manual, adjustment of benefits in order to recoup an overpayment may be implemented following a decision upon reconsideration and there is no provision for a hearing *de novo* before an administrative law judge prior to the implementation of the adjustment.

I. Jurisdiction

In plaintiff's amended complaint, jurisdiction has been asserted under 28 U.S.C. § 1331, 28 U.S.C. § 1343(4), 28 U.S.C. § 1346 and 28 U.S.C. § 1361. In his motion to dismiss for lack of jurisdiction, defendant argues that none of the above provisions confer jurisdiction on this court and that plaintiff's action is barred by Sections 205(g) and 205(h) of the Act. 42 U.S.C. § 405(g)(h).[5]

[5] Section 205(g) of the Act provides:

"(g) Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding

Section 205(g) provides that in order to obtain judicial review of a decision of the Secretary, it must be a final decision made after a hearing to which the claimant was a party, thereby requiring exhaustion of

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the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearings before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The Court shall, on motion of the Secretary made before he files his answer, remand the case to the Secretary for further action by the Secretary, and may, at any time, on good cause shown, order additional evidence to be taken before the Secretary, and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or its decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office."

Section 205(h) of the Act, 42 U.S.C. § 405(h) provides:

"(h) The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter."

administrative remedies. Section 205(h) specifically provides that no action against the Secretary shall be brought under Section 41 [now 28 U.S.C. § 1331] to recover on any claim arising under Title II of the Act. Defendant argues that Section 205(g) provides the exclusive means by which a claimant can obtain judicial review of a decision of the Secretary. Since plaintiff did not seek a *de novo* hearing before an administrative law judge following the denial of her request for reconsideration, it is argued that plaintiff's action is barred for failure to exhaust her administrative remedies. In addition, defendant argues that this action is barred by the specific language in Section 205 (h). We conclude that neither the doctrine of exhaustion of remedies nor the specific provision of Section 205(h) bar plaintiff's action under the facts of this case.

First, exhaustion is inapplicable because plaintiff claims that the statute and regulations promulgated thereunder are constitutionally insufficient in that they fail to provide a hearing prior to recoupment of an over-payment. Where a plaintiff attacks the constitutionality of the statute under which an administrative agency acts, the attack does not turn upon a factual determination requiring administrative expertise and the doctrine of exhaustion of administrative remedies, therefore, does not apply. See *Gainville* v. *Richardson,* [319] F.Supp. 16, 18 (D. Mass. 1970), and cases cited therein.

Secondly, the prohibition of Section 205(h), barring any action against the Secretary under Section 1331 of Title 28, is inapplicable in that plaintiff is not seeking to "recover on any claim" arising under Title II of the Act. The merits of plaintiff's claim are not before the Court and we are not asked to

review any decision of the Secretary. Plaintiff's sole claim is that she is entitled to a hearing prior to a determination to reduce or adjust her benefits, and plaintiff seeks declaratory and injunctive relief to remedy the constitutional deficiencies in the Secretary's procedure. Thus, plaintiff's action is barred by neither Section 205(g) nor Section 205(h). *Gainville* v. *Richardson, supra,* at 18.[6]

Plaintiff initially argues that this Court has jurisdiction under 28 U.S.C. § 1331(a),[7] providing original jurisdiction over actions arising under the Constitution, laws or treaties of the United States, where the amount in controversy exceeds $10,000. It is undisputed that the amount in controversy in this case is $1063.80. In order to meet the $10,000 amount in con-

[6] In *Johnson* v. *Robinson*, 415 U.S. 361 (1974), the Supreme Court considered the threshold issue whether 38 U.S.C. § 211(a), which prohibit judicial review of the decisions of the Administrator of Veterans' Affairs deprived the Court of jurisdiction over plaintiff's constitutional claim challenging the denial of educational benefits to conscientious objectors under the Veterans' Readjustment Act of 1966. 38 U.S.C. §§ 1651–1697. The Court held that Section 211(a) does not bar judicial consideration of questions concerning the constitutionality of veterans' benefits legislation but bars only actions seeking review of decisions of law or fact that arise in the administration of the act. To the extent Section 211(a) is similar to Section 205(h) of the Social Security Act, the analysis utilized by the Supreme Court in *Johnson* supports our conclusion that Section 205(h) does not bar judicial consideration of questions concerning the constitutionality of social security administration regulations and procedures.

[7] 28 U.S.C. § 1331(a) provides:

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum of value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

troversy requirement of Section 1331, plaintiff claims in her memorandum that she suffered physical and emotional distress as a result of the secretary's action. Plaintiff's amended complaint does not, however, include a request for any relief to compensate her for her suffering. Assuming arguendo, that this claim were properly before the Court, we would, nonetheless, conclude that it "appear[s] to a legal certainty that the claim is really for less than the jurisdictional amount". *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 289 (1938); *Nelson* v. *Keefer*, 451 F. 2d 289, 292–293 (3d Cir. 1971). In addition, plaintiff can find no solace in the fact that she purports to represent a class, for the claims of the class are not of the nature which would permit their aggregation under *Snyder* v. *Harris,* 394 U.S. 332 (1969) to satisfy the jurisdictional amount requirement.[8] Thus Section 1331(a) does not confer jurisdiction in this case, in that the $10,000 amount in controversy requirement has not been satisfied.

Secondly, plaintiff asserts 28 U.S.C. § 1343(4), providing jurisdiction, without regard to amount in controversy, to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, as the jurisdictional basis of her claim. Plaintiff's claim, however, arises under the Social Security

[8] Under *Snyder* v. *Harris*, *supra*, aggregation of claims to satisfy the amount in controversy requirement is permissible "only (1) in cases in which a single plaintiff seeks to aggregate two or more of his own claims against a single defendant and (2) in cases in which two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest." 394 U.S. at 335. Under this test, plaintiff argues that the members of the class have a "common and undivided interest" in the Social Security Trust Fund. We find this contention to be without merit.

Act and it has consistently been held that the Social Security Act is not an Act of Congress providing for the protection of civil rights. *Russo* v. *Kirby,* 453 F. 2d 548 (2d Cir. 1971); *McCall* v. *Shapiro,* 416 F. 2d 246 (2d Cir. 1969). Thus, this Court lacks jurisdiction over plaintiff's claim under Section 1343(4).

Plaintiff's allegation that 28 U.S.C. § 1346(a)(2)* provides jurisdiction likewise must fail. The Tucker Act confers concurrent jurisdiction in the District Court and the Court of Claims of any claim against the United States, not exceeding $10,000 in amount, founded upon the Constitution or any Act of Congress. Plaintiff seeks declaratory and injunctive relief, and this provision has been construed by the Supreme Court as authorizing only actions for money judgments and not suits for equitable relief against the United States. *Richardson* v. *Morris,* 41 U.S.L.W. 3390 (1973). Accordingly, Section 1346(a)(2) does not confer jurisdiction upon this Court.

The final jurisdictional provision under which plaintiff brings her action is the Mandamus Act, 28 U.S.C. §1361, which provides:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

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* 28 U.S.C. § 1346(a)(2) provides:

"(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

* * * * *

"(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

The legislative history of the mandamus statute reveals that the statute's construction turns upon traditional mandamus law, and the Court of Appeals in *Richardson* v. *United States,* 465 F. 2d 844 (3d Cir. 1972), *cert. granted* 41 U.S.L.W. 3458 (1973), summarized the prior law:

> In order for mandamus to issue, a plaintiff must allege that an officer of the Government owes him a legal duty which is a specific, plain ministerial act "devoid of judgment or discretion". [citations omitted] An act is ministerial only when its performance is positively commanded and so plainly prescribed as to be free from doubt. 465 F. 2d at 849.

Applying these standards to the facts of the instant case, neither the provision of the Act in question nor the regulations promulgated thereunder compel the Secretary to conduct a hearing prior to the recoupment of an over-payment. While the statute and regulations are silent on this issue, they must be read in conjunction with the requirements imposed upon governmental bodies by the due process clause of the Fifth Amendment, and our examination of these provisions must be concluded in conjunction with the decisions of the Supreme Court construing the due process clause. The Mandamus Act does not distinguish between a statutory duty owed to the plaintiff by the Secretary and a constitutional duty owed by the Secretary. Whether the Secretary owes plaintiff a duty under the Fifth Amendment of the Constitution can be determined only after an analysis of the requirements of the due process clause and their application to the statutory and regulatory provisions at issue. In the instant case, plaintiff relies upon

Goldberg v. *Kelly*, 397 U.S. 254 (1970), to establish the existence of the constitutional right to a prior hearing in administrative recoupment cases. She argues that *Goldberg* imposes the constitutional duty upon the Secretary to conduct a hearing prior to the adjustment or reduction of her benefits in order to recoup an over-payment and that this duty is ministerial and devoid of discretion in that it is compelled by the Constitution. The denial of the opportunity for such a prior hearing, according to plaintiff, gives rise to jurisdiction under the Mandamus Act. We agree with the Court in *Elliott* v. *Weinberger*, 371 F. Supp. 960 (D. Hawaii 1974), that the applicability of *Goldberg* and its progeny is sufficiently apparent to establish jurisdiction under Section 1361. See also *Martinez* v. *Richardson*, 472 F. 2d 1121 (10th Cir. 1973).[10]

[10] An alternative basis for sustaining jurisdiction under Section 1361 is found in *Chaudoin* v. *Atkinson* 494 F. 2d 1323 (3d Cir. 1974) where the Court of Appeals stated:

". . . a request for relief under Section 1361 requires 'the court [to] utilize all relevant legislative and other materials to determine the scope of discretion or power delegated to the officer."

In so holding, the Court relied on *Carey* v. *Local Board No. 2, Hartford, Connecticut*, 297 F. Supp. 252 (D. Conn. 1969), *aff'd.* 412 F. 2d 71 (2d Cir. 1969), where the Court held that the fact that the duty involved becomes clear only after the construction of the statute does not preclude relief under 28 U.S.C. § 1361. In so holding, the Court relied on *Roberts* v. *United States*, 176 U.S. 221 (1900), where it was stated:

"Unless the writ of mandamus is to become practically valueless, and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must, therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. . . . If the law directs him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires in some degree, a construction of its language."

We read *Chaudoin* and *Carey* to permit the court to review the appropriate constitutional provisions, legislative material and judicial decisions in order to determine whether under any of these three alternatives the basis of jurisdiction is provided under the Mandamus Act. Accordingly, we must proceed to determine whether the Secretary owes plaintiff a duty under the Fifth Amendment to the Constitution and the decisions of the courts construing that Amendment to conduct a hearing prior to the adjustment of her benefits and we may assume jurisdiction under Section 1361 for the purpose of making this determination.

Also significant is the recent decision of the Supreme Court in *Christian* v. *New York State Dept. of Labor*, 414 U.S. 614 1974), where plaintiffs challenged the Unemployment Compensation for Federal Employees Program, 5 U.S.C. § 8501 *et seq.* on the ground that they were denied benefits without a prior hearing. The district court dismissed the constitutional claims against the federal defendants, and on appeal, plaintiffs attacked this ruling arguing that mandamus jurisdiction lies where the act of a federal official, although authorized by statute, is alleged to violate the Constitution, relying on *Garfield* v. *United States ex rel. Goldsby*, 211 U.S. 249 (1908). At oral argument the Solicitor General conceded jurisdiction under the Mandamus Act. The Court therefore, did not pass on this issue, despite the fact that the Court may *sponte* pass on jurisdictional questions.

II. The Class Action

In her amended complaint, plaintiff purports to represent a class consisting of "all persons eligible for Social Security OASDI benefits, and whose benefits have been or will be reduced, terminated or otherwise summarily adjusted by defendant without notice and opportunity for a prior administrative

hearing." Preliminarily, we note at the time this action was filed plaintiff was not a member of the class she purports to represent, in that her benefits had not as yet been reduced. By subsequent administrative action, however, her request for reconsideration was denied and the adjustment was scheduled for implementation. It was only by the subsequent stipulation between the parties that her benefits have been permitted to continue.

In order to establish her right to maintain a class action, it is plaintiff's burden to satisfy all of the requirements of Rule 23(a) and one of the subdivision of 23(b). *Philadelphia Electric* v. *Anaconda Brass Co.*, 43 F.R.D. 452, 457 (E.D. Pa. 1968). With respect to Rule 23(a), defendant's affidavit reveals that in 1970 there were 1,250,000 over-payment cases, from which 12,000 requests for reconsideration were filed, and 1600 requests for hearings were filed. This alone establishes that the class is so numerous that joinder of all members is impractical. The sole issue in this action is whether adjustment of social security benefits in order to recoup an over-payment may be accomplished absent a prior hearing, and this issue presents questions of law and fact common to the class. Plaintiff's claim in this respect is typical of the claims of the class. Finally, there is no issue of adequate representation, and we recognize the competency of plaintiff's counsel. Plaintiff is proceeding under Rule 23(b)(2) which concerns the request for injunctive or declaratory relief and is specifically designed for situations seeking the vindication of constitutional rights. Upon a finding that plaintiff has satisfied the requirements of Rule 23 (a) and Rule 23(b)(2), plaintiff's motion for a class action determination will be granted as modified in our order.

III. The Three-Judge Court

Plaintiff requests the convening of a three-judge court on the ground that she is challenging the constitutionality of Section 204 of the Act, 42 U.S. § 404. Plaintiff, however, does not challenge the right of the Secretary to recoup over-payments, but merely challenges the procedure by which it is done. The language of the statute is silent on the methods by which over-payments are recovered, and it specifically provides that over-payments are to be recovered "under regulations prescribed by the Secretary". Thus, plaintiff's attack is directed toward the constitutional deficiency of the regulations in failing to provide an evidentiary hearing in advance of recoupment. Under such circumstances, a three-judge court is not required, *Mills* v. *Richardson,* 464 F. 2d 995, 1001 (2d Cir. 1972) and, accordingly, plaintiff's motion for the convening of a three-judge court will be denied.

IV. The Merits

The issue before the Court, as previously indicated, is whether the failure of the regulations promulgated pursuant to Section 204 to provide an opportunity for an evidentiary hearing prior to the adjustment of security benefits in order to recoup an over-payment is (1) contrary to the purpose of the Act and (2) unconstitutional under the Fifth Amendment to the Constitution.

V. The Purpose of the Act

The general purpose of the old-age, survivor and disability insurance provisions of Title II of the Act is to protect workers and their dependents from the

risk of loss of income due to the insured's old age, death or disability. *Delno* v. *Celebreeze,* 347 F. 2d 159, 161 (9th Cir. 1965). In the event an over-payment is made, Section 204(a) of the Act authorizes the Secretary to adjust or decrease such benefits in order to recover the over-payment. Section 204(b), however, contains a provision providing for the waiver of adjustment of recovery under certain circumstances. Where an individual is found without fault and adjustment or recovery would either defeat the purpose of Title II or be against equity or good conscience, adjustment or recovery may be waived. In the regulations, 20 CFR § 404.508, "defeat the purpose of title II" means "to deprive a person of income required for ordinary and necessary living expenses."

The manifest purpose of Section 204(b) of the Act is to render more equitable the recovery of incorrect payments to individuals, and the Secretary goes to great length to justify its "paper hearings." It is conceivable that the determination that an overpayment has been made can be readily determined in an *ex parte* proceeding by the examination of Social Security records and cancelled checks. The critical question of "fault" and whether recovery would "defeat the purpose" of the Act or be "against equity and good conscience" are less susceptible to a summary determination in an *ex parte* proceeding. In her amended complaint, plaintiff alleges that she has no other source of income and is totally disabled. She further alleges that if her benefits were reduced as proposed she would be unable to provide the bare necessities of life. Considering the "compassionate" purpose of the waiver provision, it appears incongruous that its purpose would mandate that the critical determinations be made summarily on an *ex parte* basis. Rather, the purpose of the Act contemplates that an individual who seeks to present evidence tending to establish the applicability of the waiver provision must be given an opportunity to do so prior to adjustment or reduction of benefits. Accordingly, we conclude that the failure of the regulations to provide a hearing prior to recoupment is contrary to the purpose of Title II of the Act.

This conclusion, however, does not end our inquiry for only a finding that the Secretary owes plaintiff a constitutional duty which is so positively commanded as to be devoid of judgment or discretion will support jurisdiction under Section 1361. We must, therefore, proceed to an analysis of the due process issue.

THE DUE PROCESS ISSUE

The requirements of procedural due process apply only to the deprivation of interests encompassed within the Fifth and Fourteenth Amendments' protection of liberty and property. *Board of Regents* v. *Roth,* 408 U.S. 564 (1972). Thus, the threshold question presented is whether the nature of plaintiff's asserted property interest is within the range of interests protected by the Due Process Clause of the Fifth Amendment. Initially, we note that plaintiff does not claim a property interest in the amount of the overpayment nor does she challenge the Secretary's right to recoup an overpayment by means of a civil suit.[11] We are con-

[11] Section 5501 of the Claims Manual provides that the Social Security Administration shall recoup overpayments by withholding benefits or by requesting the overpaid person to refund the amount in excess of the correct payment. Where waiver is not applicable and the overpaid person refuses to make a refund, Section 5503.9 of the Claims Manual provides that the Secretary should consider recovery by civil suit.

cerned solely with the monthly social security benefits to which plaintiff is entitled pursuant to 42 U.S.C. § 402(e)(1)(B)(ii). Plaintiff was found qualified by the Social Security Administration to receive disabled widow's insurance benefits on the social security record of her deceased husband. As long as she continues to satisfy the statutory requirements of the Act, plaintiff is entitled to receive benefits pursuant thereto. Plaintiff's property interest in her monthly benefits amounts to a statutory entitlement and, therefore, constitutes a property interest protected by the Due Process Clause of the Constitution.

The basic principles of due process are well established: Parties whose rights are affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. *Fuentes* v. *Shevin*, 407 U.S. 67 (1972). It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner". *Fuentes* v. *Shevin*, *supra*, at 80; *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). In the instant case, the regulations permit the adjustment of benefits following the summary reconsideration decision on the question of waiver, and they permit the implementation of the adjustment prior to an evidentiary hearing before an administrative law judge. To the extent that the regulations fail to provide an opportunity for evidentiary hearing before an administrative law judge prior to the reduction of benefits, we conclude that the procedure utilized to recoup over-payments is constitutionally deficient in that it fails to provide an evidentiary hearing "at a meaningful time". Plaintiff's benefits are a matter of statutory entitlement and may not be terminated, reduced

or otherwise adjusted absent an opportunity for a prior hearing. *Goldberg* v. *Kelly*, 397 U.S. 254 (1970).

The Secretary argues that *Goldberg* v. *Kelly*, *supra*, and its progeny are inapplicable to Title II of the Act and asserts several reasons in support of his argument. First, the Secretary contends that *Goldberg* and *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969) are distinguishable from cases arising under Title II in that the decisions in *Goldberg* (termination of welfare benefits) and *Sniadach* (garnishment of wages) were based on need. Under Title II, the question whether one is entitled to benefits has nothing to do with one's financial situation or need. *Goldberg* and *Sniadach*, however, merely emphasized the special importance of welfare benefits and wages, and they did not carve out a rule of necessity. *Fuentes* v. *Shevin*, *supra*, at 89. The Court in *Fuentes* clearly rejected the narrow interpretation that the Secretary urges us to adopt, holding:

> . . . Both decisions were in the mainstream of past cases, having little or nothing to do with the absolute 'necessities' of life but establishing that due process requires an opportunity for a hearing before a deprivation of property takes effect. (citations omitted) 407 U.S. at 88.

It is, therefore, apparent that under the present law need or necessity do not constitute the *sine qua non* upon which the right to procedural due process is founded.[12]

[12] In his argument, the Secretary relied heavily on *Torres* v. *New York State Dept. of Labor*, 321 F. Supp. 432 (S.D.N.Y. 1971), *vacated and remanded* 402 U.S. 968 (1971), *adhered to* 333 F. Supp. 341 (S.D.N.Y. 1971) *aff'd.* 405 U.S. 949 (1972). In

Secondly, the Secretary argues that the weight of judicial authority supports his position that *Goldberg* is inapplicable to cases arising under Title II. In *Richardson* v. *Wright*, 405 U.S. 208 *rehearing denied*, 405 U.S. 1033 (1972), the Supreme Court was faced squarely with the question whether *Goldberg* applied to cases arising under the Act. In the light of new regulations adopted by the Secretary, the Court remanded the case for reconsideration under the new regulations. The Secretary relies on *Wright* for the proposition that an evidentiary hearing is not a *per se* requirement prior to the adjustment of social security benefits in order to recoup an over-payment. We believe that the Secretary is reading too much into that decision, but it is significant in that all cases decided subsequent thereto were based on the new regulations adopted by the Secretary. The Secretary also relies on *Anderson* v. *Finch*, 322 F. Supp. 195 (N.D. Ohio 1971), *remanded* 454 F. 2d 596 (1972) and *Messer* v. *Finch*, 314 F. Supp. 511 (E.D. Ky. 1970) *judgment vacated for mootness*, 400 U.S. 987 (1971), in support of his argument. These cases, however, were decided prior to *Fuentes*, and since *Fuentes*, the weight of

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Torres, the lower court upheld the constitutionality of the New York State Unemployment Compensation statutes. The Court held that *Goldberg* did not apply to unemployment compensation because the need was not a factor in that program.

Torres was decided prior to *Fuentes*, and since *Fuentes*, three-judge courts in *Pregent* v. *New Hampshire Department of Employment*, 361 F. Supp. 782 (D. [N.] H. 1973) and in *Steinberg* v. *Fusari*, 364 F. Supp. 922 (D. Conn. 1973), rejected the *Torres* rationale in the light of *Fuentes* and held that an evidentiary hearing is required prior to the termination of unemployment benefits. See also *Wheeler* v. *Vermont*, 335 F. Supp. 856 (D. Vt. 1971). The *Steinberg* case came out of the same Circuit as did *Torres* and was apparently overlooked by the Secretary.

judicial authority establishes that procedural due process requires an evidentiary hearing prior to termination or adjustment of social security benefits. *Elliott* v. *Weinberger*, 42 U.S.L.W. 2442 (D. Hawaii, Feb. 4, 1974), (hearing required prior to adjustment of social security benefits in order to recoup an overpayment); *Eldridge* v. *Weinberger*, 361 F. Supp. 520 (W.D. Va. 1973) (hearing required prior to termination of social security benefits); *Williams* v. *Weinberger*, 360 F. Supp. 1349 (W.D. Ga. 1973) (hearing required prior to termination of social security benefits). But see *Jarbo* v. *Weinberger*, 374 F. Supp. 310, (D.W. Wash. 1973).

Finally, the Secretary argues that a pre-recoupment trial type hearing would impose an insuperable burden upon the Title II program. In support of this argument, the Secretary notes that in 1970 there were 1,250,000 over-payment cases and alludes to the financial and administrative burden involved. Such burden cannot override plaintiff's manifest due process right to a prior hearing. The Supreme Court in *Goldberg* and *Fuentes* has specifically rejected this argument where a hearing is clearly required by the Due Process Clause. Moreover, the Court in *Eldridge* v. *Weinberger*, *supra*, at 525-527, specifically rejected this argument in the context of a social security case. *See also Richardson* v. *Wright*, *supra* at 223-226 (Brennan, J., dissenting); *Elliott* v. *Weinberger*, *supra*. A prior hearing always imposes some costs in time, effort and expense, but these costs cannot outweigh the constitutional right to such a hearing. *Fuentes* v. *Shevin*, *supra*, at 90 n.22.

We conclude that the Secretary owes plaintiff a constitutional duty to afford an opportunity for an evi-

dentiary hearing prior to the adjustment of social security benefits in order to recoup an overpayment. This duty, arising out of the Due Process Clause of the Fifth Amendment, is so positively commanded by the cases construing that amendment as to be free from doubt. Accordingly, our conclusion in this respect supports our jurisdiction under the mandamus statute, 28 U.S.C. § 1361.

Once it is determined that the protection of due process applies, the next consideration is what due process safeguards are required. It is at this point that due process is flexible to the extent that only such procedural protection is required as a particular situation demands. *Morrissey* v. *Brewer*, 408 U.S. 471 (1972). Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the governmental function involved as well as the private interest that has been affected by governmental action. *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 895 (1961). In balancing the interest of the respective parties, we now become more sensitive to defendant's argument of administrative burden. Plaintiff does not seek to have us impose the full panoply of procedural safeguards upon the Secretary, rather she seeks only an opportunity to present her case at a hearing prior to any adjustment of her benefits. Accordingly, our consideration of this case will be so limited. We hold that a recipient of social security benefits is entitled by the Due Process Clause of the Fifth Amendment to an opportunity to a hearing prior to the adjustment of his social security benefits in order to recoup an overpayment. The recipient must be accorded notice of his

right to a hearing in a conspicuous manner and given sufficient time to exercise this right. We do not hold that a hearing must be held in every case, in that a voluntary, intelligent and knowing waiver of the right may obviate the need for a hearing. This, of course, presupposes adequate notice of the right to a hearing. Moreover, we see no reason why the opportunity for a hearing cannot be afforded within the present procedural framework of the Social Security Administration. The procedures followed in a general determination of qualification to Title II benefits as followed in this case need not be varied except to suspend the implementation of the adjustment of benefits until an opportunity for a hearing is afforded.

For the foregoing reasons, defendant's motion for summary judgment will be denied and plaintiff's motion for summary judgment will be granted.

ORDER

AND NOW, this 30th day of April, 1974, IT IS ORDERED that:

1. defendant's motion to dismiss the complaint for lack of jurisdiction is DENIED;
2. plaintiff's motion for a class action determination is GRANTED; the class consisting of all persons eligible for Social Security OASDI benefits within the counties encompassed by the Eastern District of Pennsylvania, whose benefits may be terminated, reduced or otherwise adjusted in order to recoup an over-payment;
3. plaintiff's motion for the convening of a three-judge court is DENIED;
4. defendant's motion for summary judgment is DENIED; and

5. plaintiff's motion for summary judgment is GRANTED.

[s] E. MAC TROUTMAN.
J.

APPENDIX D

UNITED STATES DISTRICT COURT
E. D. PENNSYLVANIA

Civ. A. No. 72-2522

ARLENE MATTERN, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED

v.

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION AND WELFARE

March 7, 1977

OPINION AND ORDER

HISTORY AND CONTENTIONS

TROUTMAN, District Judge.

This action, as *originally* filed in this Court, challenged the procedure utilized by the Secretary of Health, Education and Welfare [the Secretary] pursuant to Section 204 of the Social Security Act [the Act], to adjust or reduce social security benefits in order to recoup an alleged overpayment. Specifically, plaintiff, on behalf of herself and others similarly situated, sought injunctive and declaratory relief, requiring the Secretary to conduct an evidentiary hearing prior to adjusting or reducing social security benefits to which plaintiff is entitled under Title II of the Act. 42 U.S.C. § 401 *et seq.* Plaintiff challenged the failure to provide an oral hearing prior

to the recoupment of an alleged overpayment on the grounds that it is contrary to the purpose of the Act and violative of the Fourteenth Amendment to the Constitution. Before the Court *were* (1) defendant's motion to dismiss the complaint for lack of jurisdiction, (2) plaintiff's motion for a class action determination, (3) plaintiff's motion to convene a three-judge court, and (4) cross-motions for summary judgment.

This Court, in its opinion filed April 30, 1974, held that the Secretary of Health, Education and Welfare was constitutionally required to provide notice and opportunity for an oral evidentiary hearing, prior to the suspension of social security benefits to recover an overpayment. *Mattern* v. *Weinberger*, 377 F.Supp. 906 (E.D. Pa. 1974). The Third Circuit Court of Appeals essentially affirmed this holding, subject to certain exceptions.[1] *Mattern* v. *Weinberger*, 519 F. 2d 150 (3rd Cir. 1975). The Secretary filed a petition for a writ of certiorari with the Supreme Court (U.S. S.Ct., No. 75-649), which petition was acted upon on May 24, 1976. 425 U.S. 987, 96 S.Ct. 2196, 48 L.Ed.2d 812 (1976). The Supreme Court vacated the appellate decision and remanded for reconsideration in light of the decision in *Mathews* v. *Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

[1] The Court of Appeals held that due process did not mandate opportunity for a prior hearing where the issues were subject to resolution by documentary proof. 519 F.2d at 165. The Court of Appeals vacated the judgment of this Court and remanded for entry of an appropriate order. *Id.* at 169.

The Third Circuit of Appeals, by order of July 23, 1976, remanded the action to this Court for reconsideration in accordance with the Supreme Court's directive.

It is defendant's contention that the *Eldridge* decision is dispositive of the procedural due process issues in this litigation and requires reversal of this Court's prior opinion. Defendant further contends that *Eldridge*, in conjunction with the opinion in *Weinberger* v. *Salfi*, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975), "impacts" on the jurisdiction of this Court.

The plaintiff contends otherwise. Preliminarily, plaintiff concedes that this Court has no federal question jurisdiction under 28 U.S.C. § 1331. She properly interprets *Salfi* as holding (prior to *Eldridge*) that the only avenue open for judicial review is under 42 U.S.C. § 405(g).[2] The defendant has contended

[2] Section 205(g) of the Act provides:

"(g) Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming,

throughout that our jurisdiction is so limited. Plaintiff further contends, however, that in *Eldridge* the Court modified the jurisdictional holding of *Salfi*. We quote as follows from plaintiff's brief:

> "The Court stated that the exhaustion requirement contained two elements, one which could be 'waived' by the Secretary and one which could not be waived. 96 S.Ct. 899. The non-waivable,

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modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court shall, on motion of the Secretary made before he files his answer, remand the case to the Secretary for further action by the Secretary, and may, at any time, on good cause shown, order additional evidence to be taken before the Secretary, and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or its decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office."

'jurisdictional' element was the requirement that a claim be 'presented' to the Secretary for purposes of a final decision to enable federal court review. The waivable element was the requirement of 'exhaustion' of the Secretary's administrative remedies. 96 S.Ct. 899. These elements are satisfied in the case at bar.

"In *Eldridge*, the Court held that the plaintiff's claim had been presented to the Secretary through the filing of an application for benefits, and by presenting claims to the district office and Regional offices of the Social Security Administration. Furthermore, Mr. Eldridge had answered a state agency questionnaire regarding his continuing disability and he had written and sent a letter in response to the Secretary's tentative determination that his disability had ceased, contesting the Secretary's action, which claim the Secretary had denied. 96 S.Ct. 900. Similarly, Mrs. Mattern has presented her benefit claim to the Secretary to satisfy the jurisdictional requirements of *Eldridge*.

"As the record herein shows (Appendix, 54a) and as noted by this Court, Mrs. Mattern opposed the Secretary's proposed action to terminate her benefits. 377 F.Supp. at 909. She answered the Secretary's 'without fault' questionnaire and submitted a waiver of overpayment request. Appendix, 54a-57a. She also filed a request for a reconsideration determination (Appendix, 63a) which was denied, although the amount of her proposed monthly repayments was thereafter reduced. Appendix, 67a; 519 F.2d at 155.

"While Mrs. Mattern may or may not have 'presented' her constitutional claim to the Secretary, such is not required under *Eldridge*. The Court stated in *Eldridge* that while the Secretary may have the authority to determine the timing and content of the challenged procedures, the Secretary would not be required 'even to consider such a challenge since it is 'unrealistic' to expect the Secretary to consider 'substantial changes' in the current administrative review system 'at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context'. 96 S.Ct. at 900.

"The Court held that the waivable element of obtaining a final decision of the Secretary by Exhaustion of remedies was also satisfied in *Eldridge*. The Court noted that the Secretary has the discretion to waive exhaustion requirements either because the 'internal needs of the agency are fulfilled' or because the relief sought is 'beyond his power to confer'. 96 S.Ct. at 900. However, the Court also noted that in certain circumstances the failure or refusal of the Secretary to waive the exhaustion requirements is not entitled to deference by the courts if 'a claimant's interest in having a particular matter resolved promptly is so great that deference to the agency's judgment is inappropriate'. *Id.* The Court in *Eldridge* held that such a case had been presented where the claimant's 'constitutional challenge was entirely collateral' to the substantive claim of entitlement, and where 'full relief cannot be obtained at a post deprivation hearing'. 96 S.Ct. at 901. The Court then found that Mr. Eldridge has raised at least a 'colorable claim'

that an erroneous termination would not be subsequently recompensable. *Id.*

"Similarly, in the instant case Mrs. Mattern has not fully exhausted administrative remedies, but has presented a claim which would be futile to pursue through final agency procedures. Certainly, her interest in the prompt resolution of the matter should outweigh deference to agency exhaustion requirements in that her benefits were to be terminated without a hearing. Unquestionably, her constitutional claim is entirely collateral to her claim for benefits, as the purpose of her suit is to obtain procedural due process for all claimants similarly situated. In this regard, the Court noted the 'core principle that statutorily created finality requirements, should if possible, be construed so as not to cause crucial collateral claims to be lost and potential irreparable injuries to be suffered. 96 S.Ct. at 901, fn. 11.

"It is submitted that Mrs. Mattern has also satisfied the exhaustion requirements of *Salfii*, in that the Secretary appears to have waived the exhaustion requirement herein by not having raised a sufficient 'challenge' to the allegations of exhaustion in paragraph #24 of the Complaint herein. Appendix 11a. See *Salfi, supra*, 95 S.Ct. at 2468. In addition, further exhaustion of administrative remedies herein would be futile and a waste of agency resources. As noted by Justice Rehnquist in *Salfi*:

> " 'Plainly these [exhaustion] purposes have been served once the Secretary satisfies himself that the only issue is the constitutionality of a statutory requirement, a matter which is beyond his jurisdiction to

> determine, and that the claim is neither otherwise invalid nor cognizable under a different section of the Act. Once a benefit applicant has presented his or her claim at a sufficiently high level of review to satisfy the Secretary's administrative needs, further exhaustion would not merely be futile for the applicant, but would also be a commitment of administrative resources unsupported by any administrative or judicial interest'. *Weinberger* v. *Salfi*, 95 S.Ct. at 2467.

> "In light of the above, it is clear that Mrs. Mattern has presented her claim to the Secretary and has sufficiently exhausted her administrative remedies for purposes of obtaining a final decision for federal court consideration. Therefore although 42 U.S.C. § 405 was not claimed as a basis of jurisdiction in the Amended Complaint, clearly such basis of jurisdiction exists in this case, and this Court may proceed to decide the merits of this matter."

Thus, plaintiff contends that this Court should now assume jurisdiction under § 405(g), continue jurisdiction under 28 U.S.C. § 1361 and by either avenue afford the plaintiff the relief previously afforded which she continues to seek.

OUR PRIOR DECISION

In our prior decision (377 F.Supp. 906) we denied jurisdiction under 28 U.S.C. § 1331, § 1343(4) and § 1346. We assumed jurisdiction under 28 U.S.C. § 1361. The defendant vigorously argued, at that

time, that our jurisdiction was limited to 42 U.S.C. § 405(g) and that the specific language of § 405(h) barred our affording, in *this* action, the relief sought, for failure by plaintiff to exhaust her administrative remedies under § 405(g). Pointing out that plaintiff's action was bottomed on constitutional claims and that the merits of plaintiff's case were not before us, we concluded that jurisdiction rested upon 28 U.S.C. § 1361.[3] It provides:

> "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

We reviewed the prior law as follows:

> "The legislative history of the mandamus statute reveals that the statute's construction turns upon traditional mandamus law, and the Court of Appeals in *Richardson* v. *United States*, 465 F.2d 844 (3d Cir. 1972), *cert. granted* 410 U.S. 953, 93 S.Ct. 1420, 35 L.Ed.2d 686 (1973), summarized the prior law:
>
> > " 'In order for mandamus to issue, a plaintiff must allege that an officer of the Government owes him a legal duty which is a specific, plain ministerial act "devoid of the exercise of judgment or discretion". [citations omitted] An act is ministerial only when its performance is positively com-

[3] We shall not further discuss our reasoning, there expressed, as to the jurisdictional reach of § 1311, § 1343(4) and § 1346.

manded and so plainly prescribed as to be free from doubt.' 465 F.2d at 849."

And then we stated:

"Applying these standards to the facts of the instant case, neither the provision of the Act in question nor the regulations promulgated thereunder compel the Secretary to conduct a hearing prior to the recoupment of an overpayment. While the statute and regulations are silent on this issue, they must be read in *conjunction with the requirements imposed upon governmental bodies by the due process clause of the Fifth Amendment*, and our examination of these provisions must be conducted in *conjunction with the decisions of the Supreme Court* construing the due process clause. The Mandamus Act does not distinguish between a statutory duty owed to the plaintiff by the Secretary and a constitutional duty owed by the Secretary. Whether the Secretary owes plaintiff a duty under the Fifth Amendment of the Constitution can be determined only after an analysis of the requirements of the due process clause and their application to the statutory and regulatory provisions at issue. In the instant case, plaintiff relies upon *Goldberg* v. *Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), to establish the existence of the constitutional right to a prior hearing in administrative recoupment cases. She argues that *Goldberg* imposes the constitutional duty upon the Secretary to conduct a hearing prior to the adjustment or reduction of her benefits in order to recoup an over-payment and that this duty is ministerial and devoid of discretion in that it

is compelled by the Constitution. The denial of the opportunity for such a prior hearing, according to plaintiff, gives rise to jurisdiction under the Mandamus Act. *We agree* with the Court in *Elliott* v. *Weinberger*, 371 F.Supp. 960 (D.Hawaii 1974), *that the applicability of Goldberg and its progeny is sufficiency apparent to establish jurisdiction under Section 1361. See also Martinez* v. *Richardson*, 472 F.2d 1121 (10th Cir. 1973)." [Emphasis added]

Not surprisingly, it is thus apparent from language therein used that our prior opinion and conclusions were based upon our understanding of the then existing law as pronounced in *Goldberg* and construed by other courts. In discussing "due process", we stated:

"The basic principles of due process are well established: Parties whose rights are affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. *Fuentes* v. *Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner'. *Fuentes* v. *Shevin*, *supra*, at 80; *Armstrong* v. *Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965). In the instant case, the regulations permit the adjustment of benefits following the summary reconsideration decision on the question of waiver, and they permit the implementation of the adjustment prior to an evidentiary hearing before an administrative law judge. To the extent that

> the regulations fail to provide an opportunity for evidentiary hearing before an administrative law judge prior to the reduction of benefits, we conclude that the procedure utilized to recoup over-payments is constitutionally deficient in that it fails to provide an evidentiary hearing 'at a meaningful time'. Plaintiff's benefits are a matter of statutory entitlement and may not be terminated, reduced or otherwise adjusted absent an opportunity for a prior hearing. *Goldberg* v. *Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed. 2d 287 (1970)."

We rejected the defendant's contention that *Goldberg* was inapplicable because if was based upon need and in so doing relied upon *Fuentes* and after quoting therefrom said as follows:

> "It is, therefore, apparent that under the present law need or necessity do not constitute the *sine qua non* upon which the right to procedural due process is founded."

followed by a footnote:

> "12. In his argument, the Secretary relied heavily on *Torres* v. *New York State Dept. of Labor*, 321 F.Supp. 432 (S.D.N.Y. 1971), *vacated and remanded*, 402 U.S. 968, 91 S.Ct. 1685, 29 L.Ed. 2d 133 (1971), *adhered to* 333 F.Supp. 341 (S.D.N.Y. 1971), *aff'd* 405 U.S. 949, 92 S.Ct. 1185, 31 L.Ed.2d 228 (1972). In *Torres*, the lower court upheld the constitutionality of the New York State Unemployment Compensation statutes. The Court held that *Goldberg* did not apply to unemployment compensation because the need was not a factor in that program.

> *Torres* was decided prior to *Fuentes*, and since *Fuentes*, three-judge courts in *Pregent* v. *New Hampshire Department of Employment*, 361 F.Supp. 782 (D.N.H. 1973) and in *Steinberg* v. *Fusari*, 364 F.Supp. 922 (D.Conn. 1973), rejected the *Torres* rationale in the light of *Fuentes* and held that an evidentiary hearing is required prior to the termination of unemployment benefits. *See also Wheeler* v. *Vermont*, 335 F.Supp. 856 (D.Vt. 1971). The *Steinberg* case came out of the same circuit as did *Torres* and was apparently overlooked by the Secretary."

Had the Supreme Court found the opportunity to express itself in *Wright* we would not have misread its intentions as to the limits of the *Goldberg* decision. In our prior opinion, we stated:

> "Secondly, the Secretary argues that the weight of judicial authority supports his position that *Goldberg* is inapplicable to cases arising under Title II. In *Richardson* v. *Wright*, 405 U.S. 208, 92 S.Ct. 788, 31 L.Ed.2d 151, *rehearing denied*, 405 U.S. 1033, 92 S.Ct. 1274, 1296, 31 L.Ed.2d 490 (1972), the Supreme Court was faced squarely with the question whether *Goldberg* applied to cases arising under the Act. In the light of new regulations adopted by the Secretary, the Court remanded the case fer reconsideration under the new regulations. The Secretary relies on *Wright* for the proposition that an evidentiary hearing is not a *per se* requirement prior to the adjustment of social security benefits in order to recoup an over-payment. We believe that the Secretary is reading too much into that decision, but it is significant in that all

cases decided subsequent thereto were based on the new regulations adopted by the Secretary. The Secretary also relies on *Anderson* v. *Finch*, 322 F.Supp. 195 (N.D.Ohio 1971), *remanded* 454 F.2d 596 (6th Cir. 1972) and *Messer* v. *Finch*, 314 F.Supp. 511 (E.D.Ky. 1970), *judgment vacated for mootness*, 400 U.S. 987, 91 S.Ct. 455, 27 L.Ed.2d 435 (1971), in support of his argument. These cases, however, were decided prior to *Fuentes*, and since *Fuentes*, the weight of judicial authority establishes that procedural due process requires an evidentiary hearing prior to termination or adjustment of social security benefits. *Elliott* v. *Weinberger*, 371 F.Supp. 960 (D.Hawaii 1974), (hearing required prior to adjustment of social security benefits in order to recoup an overpayment); *Eldridge* v. *Weinberger*, 361 F.Supp. 520 (W.D. Va. 1973) (hearing required prior to termination of social security benefits); *Williams* v. *Weinberger*, 360 F.Supp. 1349 (N.D.Ga. 1973) (hearing required prior to termination of social security benefits). * * *"

Thus, our prior disposition of this case was based primarily upon *Goldberg* as we construed it in the light of other cases such as *Sniadach* [*Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349], *Fuentes*, etc. Note our reliance upon *Eldridge* at the District level. Perhaps redundantly, we have quoted from our prior opinion so that the reader may appreciate the extent to which we relied upon *Goldberg* and its progeny.

It is now our duty to "reconsider", in the light of *Eldridge*, what we previously did.

JURISDICTION

The views of the District Court in *Eldridge* were described as follows (424 U.S. pp. 325, 326, 96 S.Ct. p. 898):

> "The District Court concluded that the administrative procedures pursuant to which the Secretary had terminated Eldridge's benefits abridged his right to procedural due process. The court viewed the interest of the disability recipient in uninterrupted benefits as indistinguishable from that of the welfare recipient in *Goldberg*. *It further noted that decisions subsequent to Goldberg demonstrated that the due process requirement of pretermination hearings is not limited to situations involving the deprivation of vital necessities.* See *Fuentes* v. *Shevin*, 407 U.S. 67, 88-89, 92 S.Ct. 1983, 1998-1999, 32 L.Ed.2d 556 (1972); *Bell* v. *Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971). Reasoning that disability determinations may involve subjective judgments based on conflicting medical and nonmedical evidence, the District Court held that prior to termination of benefits Eldridge must be afforded an evidentiary hearing of the type required for welfare beneficiaries under Title IV of the Social Security Act. Id., at 528, 91 S.Ct. 1586, 29 L.Ed.2d 90 * * *" (Emphasis added)

Our views were substantially the same in reaching our original decision. However, we based jurisdiction

upon § 1361. The Supreme Court does not preclude § 1361 as a basis for jurisdiction given such compelling circumstances as would warrant jurisdiction under the Mandamus statute (see footnote 12, p. 332). However, it is not easy to visualize those circumstances under which § 1361 jurisdiction would properly attach. Under *Eldridge* the jurisdictional requirements of § 405(g) are lessened. Exhaustion of remedies, as we knew it and construed it, is lessened so that, under *Salfi*, as construed in *Eldridge*, the claimant need not pursue each and every step prescribed by statute and regulations *before* appealing to court. Rather, he may reach the court at a much earlier stage. His claim must have been "presented" to the Secretary but his remedies need not have been "exhausted" in the complete and historical sense as heretofore contemplated by this and other courts. As the Supreme Court stated:

> "But cases may arise where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate. This is such a case." (p. 330, 96 S.Ct. p. 900)

It is doubtful, under *Eldridge* and under the facts here involved that we have § 1361 jurisdiction, an issue which need not be met assuming jurisdiction under § 405(g). Other cases within this Circuit have concluded that jurisdiction does not exist under § 1361. *Jamieson* v. *Weinberger*, 379 F.Supp. 28 (E.D.Pa. 1974); *McDonald et al.* v. *Weinberger et al.*, (Civil No. 74-1219) (M.D. Pa. 1976). Assuming

jurisdiction on either basis or both, we thus reach the question whether the Secretary's procedures comport with due process or whether plaintiff is entitled to the extraordinary relief sought beyond the relief afforded by the Secretary.

ADMINISTRATIVE PROCEDURES

Section 204 of the Act, 42 U.S.C. § 404, authorizes the Secretary, under regulations prescribed by him, to recover incorrect overpayments or to adjust benefits to provide for such recovery. Section 204 provides in pertinent part:

> "(a) Whenever the Secretary finds that more or less than the correct amount of payment has been made to any person under this sub-chapter, proper adjustment or recovery shall be made, under regulations prescribed by the Secretary, as follows:
>
> "(1) With respect to payment to a person of more than the correct amount, the Secretary shall decrease any payment under this subchapter to which such overpaid person is entitled, or shall require such overpaid person or his estate to refund the amount in excess of the correct amount, or shall decrease any payment under this subchapter payable to his estate or to any other person on the basis of the wages and self-employment income which were the basis of the payments to such overpaid person, or shall apply any combination of the foregoing. . . .
>
> "(b) In any case in which more than the correct amount of payment has been made, there

> shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."

Under subsection (b) of Section 204, no adjustment or recovery shall be made where such person is without fault[4] and such adjustment or recovery would

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[4] "Fault" is defined in 20 CFR § 404.507 which provides:

'Fault' as used in 'without fault' (see §§ 404.506 and 405.355) applies only to the individual. Although the Administration may have been at fault in making the overpayment, that fact does not relieve the overpaid individual or any other individual from whom the Administration seeks to recover the overpayment from liability for repayment if such individual is not without fault. In determining whether an individual is at fault, the Administration will consider all pertinent circumstances, including his age, intelligence, education, and physical and mental condition. What constitutes fault (except for 'deduction overpayments'—see § 404.510) on the part of the overpaid individual or on the part of any other individual from whom the Administration seeks to recover the overpayment depends upon whether the facts show that the incorrect payment to the individual or to a provider of services or other person, or an incorrect payment made under section 1814(e) of the Act [42 U.S.C.A. § 1395f(e)], resulted from:

"(a) An incorrect statement made by the individual which he knew or should have known to be incorrect; or

"(b) Failure to furnish information which he knew or should have known to be material; or

"(c) With respect to the overpaid individual only, acceptance of a payment which he either knew or could have been expected to know was incorrect."

defeat the purpose of Title II of the Act[5] or would be against equity and good conscience.[6] See also 20

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[5] The phrase "defeat the purpose" of Title II is defined in 20 CFR § 404.508, which provides:

"(a) General. 'Defeat the purpose of title II [42 U.S.C.A. § 401 et seq.],' for purposes of this subpart, means defeat the purpose of benefits under this title, i.e., to deprive a person of income required for ordinary and necessary living expenses. This depends upon whether the person has an income or financial resources sufficient for more than ordinary and necessary needs, or is dependent upon all of his current benefits for such needs. An individual's ordinary and necessary expenses include:

"(1) Fixed living expenses, such as food and clothing, rent, mortgage payments, utilities, maintenance, insurance (e.g., life, accident, and health insurance including premiums for supplementary medical insurance benefits under title XVIII [42 U.S.C.A. § 1395 et seq.]), taxes, installment payments, etc.;

"(2) Medical, hospitalization, and other similar expenses;

"(3) Expenses for the support of others for whom the individual is legally responsible; and

"(4) Other miscellaneous expenses which may reasonably be considered as part of the individual's standard of living.

"(b) When adjustment or recovery will defeat the purpose of title II [42 U.S.C.A. § 401 et seq.]. Adjustment or recovery will defeat the purposes of title II [42 U.S.C.A. § 401 et seq.] in (but is not limited to) situations where the person from whom recovery is sought needs substantially all of his current income (including social security monthly benefits) to meet current ordinary and necessary living expenses."

[6] "Against equity and good conscience" is defined in 20 CFR § 404.509, which provides:

"'Against equity and good conscience' means that adjustment or recovery of an incorrect payment (under title II or title XVIII [42 U.S.C.A. § 401 et seq. or § 1395 et seq.]) will

CFR §404.506. 20 CFR § 404.901 et seq. of the Social Security Administration regulation sets forth a four-step administrative process by which a claimant may obtain review of a decision to adjust benefits in order to recoup an overpayment. Following an initial determination that an overpayment has been made and that there is no basis for waiver of recovery, the claimant may obtain reconsideration pursuant to 20 CFR 404.914. Subsequent to a reconsidered determination, an individual may request a hearing *de novo* before an administrative law judge, 20 CFR 404.917, and review by the Appeals Council of the Social Security Administration. 20 CFR 404.945. Thereafter, a claimant may seek judicial review in the district courts pursuant to § 205(g) of the Act. 42 U.S.C. § 405(g). During the period that a claimant is pursuing his administrative remedies, there is no provision in the Act or in the regulations, requiring that a hearing must be conducted prior to implementation of any adjustment or recovery. Section 5503.5 of the Claims Manual provides that where reconsideration of an initial determination is requested, "withholding to recoup the overpyament will be further deferred and payment will be continued" until a decision upon reconsideration is made. Thus, under the regulations and provisions of the

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be considered inequitable if an individual, because of a notice that such payment would be made or by reason of the incorrect payment, relinquished a valuable right (examples (1), (2) and (5) or changed his position for the worse (examples (3) and (4)). In reaching such a determination, the individual's financial circumstances are irrelevant."

Claims Manual, adjustment of benefits in order to recoup an overpayment may be implemented following a decision upon reconsideration and there is no provision for a hearing *de novo* before an administrative law judge prior to the implementation of the adjustment.

PROCEDURAL DUE PROCESS

The procedures described are not unlike those considered in *Eldridge*. They ultimately reach the same result as *Eldridge*. Should it be determined that the claimant is entitled to those payments of which she has been deprived, she is reimbursed retroactively. Our previous conclusions were based upon a recognition of the intervening needs of the claimant, equating same with the needs of a welfare recipient in the light of the purposes of the Act. Our views as reflected in the language of our prior opinion are apparent. Now, *Eldridge* tells us that in the light of the elaborate character of the administrative procedures provided by the Secretary, due process does not require an evidentiary hearing "prior to temporary deprivation" of benefits in the case of disability recipients (424 U.S. p. 340, 96 S.Ct. 893). Contrasting the financial needs of a welfare recipient "on the very margin of subsistence" with that of a disability claimant, and considering "[other] potential sources of temporary income" available to the latter, the Court has concluded that "something less than an evidentiary hearing is sufficient prior to

adverse administrative action" (p. 343, 96 S.Ct. p. 907).

Mr. Eldridge was a Social Security claimant. Mrs. Mattern is a Social Security claimant. Mrs. Mattern's benefits are reduced because of an "overpayment" allegedly received. Certainly the right of a claimant who has been overpaid can rise no higher than one who has received no such overpayment. To give back that which one has erroneously received and to which there was never any entitlement appears to be far less burdensome than the loss of that to which one may or may not ultimately be entitled. The potential deprivation here appears to be less than in *Eldridge* "although the degree of difference can be overstated" (p. 341, 96 S.Ct. p. 906).

Neither are we convinced that the "without fault" provisions of the Act and the resulting issues to be decided differentiate this case from *Eldridge*. These issues and the determination thereof are not unlike the "subjective judgments based on conflicting medical and nonmedical evidence" (p. 326, 96 S.Ct. p. 898) involved in *Eldridge*. In fact, the determinations here may be far less subjective, less complicated and less involved than those involved in *Eldridge*. It appears to be a "more sharply focused and easily documented decision" (p. 343, 96 S.Ct. p. 907) than that involved in *Eldridge*.

In *Jamieson* v. *Weinberger*, 379 F.Supp. 28 (E.D. Pa. 1974) our colleague, Judge Bechtle, wisely stated (p. 36) "Here the determination whether or not an individual is at fault under § 204(a)(1) of the

Act requires the exercise of judgment by the agency * * *".

In considering other issues and tests discussed at length in *Eldridge* such as pretermination procedures, the reversal rate, the private interest, the public interest, etc., the instant case is not materially unlike the *Eldridge* case in each instance. We understand and we respect the plaintiff's contentions. We are not unsympathetic to her arguments and her urgings. However, we are unconvinced that plaintiff's position is sufficiently unlike *Eldridge* to justify the distinctions sought by plaintiff.

REFLECTIONS

In reaching our conclusion we seem to have traveled down a not unfamiliar trail winding through the forest of procedural due process. Among the somewhat familiar landmarks which we passed was the opinion of this writer in the three-judge court decision in *Epps et al.* v. *Cortese et al.*, 326 F.Supp. 127 (E.D.Pa. 1971). There, in concluding that the procedures under the Pennsylvania Replevin Act comported with procedural due process, we sought to distinguish *Goldberg*. We said:

> "* * * The prehearing termination of welfare benefits deprived ostensibly eligible recipients of the very means by which to live for an indeterminate period of time. The governmental interest in preserving the uninterrupted receipt of welfare, considering the 'brutal need' and destitute circumstances of the ostensibly eligible wel-

fare recipients clearly outweighed countervailing fiscal and administrative considerations. * * *

"In the instant case, based upon the facts as stipulated, we find no irreparable harm or unconscionable hardships akin to those suffered in *Sniadach*, *Goldberg* and the cases cited by plaintiffs. * * * The plaintiffs have not shown that they suffered 'grievous loss' of any kind by reason of the temporary dispossession suffered here. * * *" Id. 134.

In reversing that decision, the Supreme Court pointed out that the court below had misread both *Goldberg* and *Sniadach*, stating:

"This reading of *Sniadach* and *Goldberg* reflects the premise that those cases marked a radical departure from established principles of procedural due process. They did not. Both decisions were in the mainstream of past cases, having little or nothing to do with the *absolute* '*necessities*' of life * * *. While *Sniadach* and *Goldberg* emphasized the special importance of wages and welfare benefits, they did not convert that emphasis into a new and more limited constitutional doctrine.

"Nor did they carve out a rule of '*necessity*' for the sort of nonfinal deprivations of property that they involved. * * *" (Emphasis added) 407 U.S. 88, 89, 92 S.Ct. 1998, 32 L.Ed.2d 574, 575 (1971).

Now *Eldridge* holds that *Goldberg* is limited to welfare assistance given to persons on the "very margin of subsistence", involving the "very means by which to live" and draws an even finer line of distinction between the needs of a Social Security recipient and a Welfare recipient. The so-called "brutal need" involved in *Goldberg*, now recognized in *Eldridge*, was the precise point emphasized by the three-judge court in *Epps*.

Therefore, at the end of this long trail, we find ourselves substantially where we started six years ago.

CONCLUSION

Thus, we are compelled to reverse our prior decision. Doubting that we have jurisdiction under § 1361, but assuming that we have jurisdiction under § 405(g), we shall deny the defendant's motion to dismiss, deny plaintiff's motion for a class action, *Weinberger* v. *Salfi*, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975), and grant defendant's motion for summary judgment.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1629

ARLENE M. MATTERN, APPELLANT

vs.

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION AND WELFARE

(D.C. Civil Action No. 72-2522)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: GIBBONS and HUNTER, *Circuit Judges* and STAPLETON, *District Judge.**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on February 17, 1978.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed March 8, 1977, be, and the

* Honorable Walter K. Stapleton, United States District Judge for the District of Delaware, sitting by designation.

same is hereby reversed and the case is remanded for further proceedings consistent with the opinion of this Court.

ATTEST:

/s/ M. Elizabeth Ferguson
M. ELIZABETH FERGUSON
Chief Deputy Clerk

June 30, 1978

APPENDIX F

I. Pertinent Provisions of the Social Security Claims Manual

5500. Overpayments Defined

"Overpayment" means payment of any sum in excess of the amount to which the person was entitled or a payment where nothing was due. When a benefit check is cashed by means of forgery, it is technically not an overpayment of title II funds. In such cases section 204 of the Act will not apply with respect to either recovery or waiver of recovery or adjustment of the incorrect payment. The recovery of such amounts is the responsibility of the Treasury Department. However, if the SSA incorrectly certifies the address of someone other than the intended payee and the recipient who has the same or similar name as the beneficiary cashes the check, the negotiation is not considered to be a forgery. Under such conditions recovery or waiver rests with SSA (See § 5521).

Liability for repayment of an overpayment must be determined in all cases. Where benefits are paid directly to a beneficiary, liability falls on the overpaid beneficiary. Where a representative payee receives the

payment, or when the LS has been paid to a funeral home, guides for determining liability are set out in §§ 5511–5512. Where the overpaid person dies before recovery is made, see § 5530 for liability of decedent's estate.

A benefit paid on the basis of an erroneous report by the Deparment of Defense of the death of an individual in the line of duty while he is a member of the uniformed forces on active duty will be considered a correct payment for months prior to the month the SSA is notified that the individual is alive. (See § 5524.5)

The failure to deduct the premium obligation of an enrollee under Part B of title XVIII from his monthly benefit due to an error by the reviewing office of which they should reasonably have been aware is considered an overpayment subject to recovery or waiver under section 204 of the Act. (See § 10470.)

An overpayment also occurs when a payment of past due benefits is made to an individual and such payment has not been reduced by the amount of the attorney's fee payable directly to an attorney under section 206 of the Act. (See § 3526).

5501. Obligations of SSA When Overpayments Occur

Where an overpayment has been made, the SSA is required by sec. 204(a) of the Act to recoup such amounts by:

(*a*) Withholding benefits otherwise due the overpaid person on any E/R, or due other persons entitled to payments on the same E/R on which the overpayment was made; or

(*b*) Requesting the overpaid person or his estate to refund the amount in excess of the correct payment; or

(*c*) Any combination of (*a*) and (*b*).

However, if the person from whom recoupment is sought is not at fault and adjustment or recovery would cause financial hardship, or be inequitable, relief from repayment can be granted in accordance with sec. 204(b) of the Act, the waiver provision of the law.

Under the above provisions of the law, we must, on the one hand, safeguard the trust funds and attempt to make them whole by recovering benefits incorrectly paid. On the other hand, we must recognize the rights of beneficiaries to waiver of recovery or their need for relief by partial adjustment, when the facts justify such action.

5501.2 When to Limit Recovery Efforts—Tolerance Rule

(*a*) *General*

In pursuing collection of debts, there is a point of diminishing returns beyond which further collection efforts are not justified. For example, do not undertake costly efforts to recover debts involving insignificant amounts. Also, do not prolong recovery efforts if it is evident that the overpaid person does not have the financial means to repay.

Although no recoupment action will be taken where the tolerance rule applies, accept any voluntary refund by the beneficiary.

(*b*) *Tolerance Rule*

1. Overpayment $15.00 or less—if immediate adjustment is available, recover any overpayment which does not exceed $15.00, and notify the person of the action taken.

Immediate adjustment is available only if benefits for prior months (i.e., an underpayment) is due the person primarily liable for repayment and/or a lump-sum death payment is payable. Because of the advance notice of adjustment requirement, adjustment is not immediately available if benefits are payable for only the current and future months or if benefits are not currently due.

If immediate adjustment is not available, do not send a notice of overpayment. In such case there will be no attempt to recover the overpayment.

2. Overpayment $15.01 or Larger—If the overpayment exceeds $15.00, recovery will be attempted from the person primarily liable regardless of the method of recovery (i.e., adjustment or refund). Such overpayments will be processed under the usual rules.

5501.3 Application of Tolerance Rule

(*a*) *General*

The "$15 tolerance for limiting the collection of debts stated in § 5501.2 are applied to those overpayment cases processed manually. When overpayments are computer processed, letters requesting refund and proposing adjustment are generated even though the amount of the overpayment is $15 or less. Programing changes still have to be made to fully effectuate application of the tolerance.

In any case, where a beneficiary offers to refund the amount of the overpayment, accept it regardless of the amount (see § 5501.2).

(*b*) *District Office Procedures*

If a beneficiary contacts a district office about a request for refund or proposed adjustment processed by the computer where the amount of the overpayment is $15 or less, and raises a question about the correctness of the overpayment determination or about the recovery action, obtain form SSA–795 or an RC, and forward to the reviewing office. Take no additional development with respect to the overpayment determination or waiver. If adjustment has been proposed in such a situation, see §§ 5503.6–5503.65 concerning use of the SSA–2521 and/or SSA–3079.

(*c*) *Reviewing Office Procedures*

Upon receipt of information either from the DO or direct from a beneficiary where the beneficiary either fails to make refund of an overpayment of $15 or less processed by the computer or protests the adjustment action in such case, file the material in the claims folder. Advise the beneficiary that it will not be necessary for him to repay this amount, and, if adjustment has been proposed, see § 5503.6(b).

5502. How Overpayments Are Handled—General Definitions

(*a*) *Recovery*

This is a term that is often used to refer to all methods of obtaining the money that was overpaid. These methods are:

(*1*) *adjustment*

If benefits are payable to the overpaid person on any E/R, or to other persons entitled to payments on the same E/R on which the overpayment was made, these benefits may be withheld and the overpayment may thus be *adjusted* (§§ 5513–5520.2).

(*2*) *refund*

If adjustment is not available, the money may be recovered by obtaining a *refund* from the overpaid person. (§§ 5525–5530.5).

(*3*) *civil suit*

Under certain conditions, cases may be referred to GAO for recovery from the overpaid person. (§§ 5531–5535).

(*b*) *Waiver*

Under certain conditions, it is possible to grant relief from repayment. In such cases, we talk in terms of *waiving* recovery, or adjustment of the overpayment. (For purposes of waiver, overpayments are classified as either entitlement or deduction overpayments). Detailed procedures on *waiver* of recovery or adjustment are stated in §§ 5540–5586.

(*c*) *Fraud Involved*

Where a violation of one of the criminal provisions of the act in connection with a claim is suspected and an overpayment exists, all appropriate postadjudicative and recovery actions must be taken to the U.S. Attorney or OPO, BRSI, Program Compliance Branch in accordance with §§ 7543 ff. Thus, action to recover an overpayment will be taken as described above and in the succeeding sections notwithstanding fraud involvement.

SUMMARY OF PROCEDURES FOR DEALING WITH OVERPAYMENTS

5503. Written Notice

When it is determined that an overpayment has been made, the person liable for repayment should be notified in writing (see § 5508.5 for sample letters). The notice will inform the person of:

(a) The incorrect payment made and how and when it occurred (i.e., the overpaid amount, the monthy amount, if any, which should have been paid, why the lesser amount was due the months for which the lesser amount should have been paid, and the amount which was paid for those months). If the overpayment resulted from the entitlement of another beneficiary, the adversely affected individual(s) must be informed of the name, relationship to the WE, and basis for entitlement of the new beneficiary. (see § 4571 (a)).

(b) The right to request reconsideration of the overpayment determination.

(c) The required recovery.

(d) The proposed adjustment or the demand for overpayment determination.

(e) The waiver provisions of the law (Social Security Act, secs. 204(b) or 1870(c)).

(f) The availability of partial adjustment or partial refund.

(g) The need to notify the DO promptly if the

person feels that the circumstances in the case would justify reconsideraiton, waiver, partial adjustment, or partial refund.

It may be necessary to modify the overpayment notice in certain instances. For example, where an overpayment for a prior year cannot be fully recovered by adjustment until some month past the current year, include a request for refund of the entire overpayment when notifying the person of the overpayment and of the proposed adjustments. Advise the person that, if refund is received, payment of benefits can by resumed for an earlier month. Also, when recovery from a person outside the U.S. is involved, see § 5529.

5503.1 Delay in Withholding Benefits to Recover Overpayments

Before adjusting an overpayment against current benefits due a beneficiary, he (and, if applicable, his payee) will normally be given reasonable opportunity to contest the correctness of the determination or to establish that a basis exists for waiver or partial adjustment. The notice will specify the month and year the adjustment is scheduled to begin; the date of the proposed adjustment must be at least 30 days later than the date of the overpayment notice. Actual adjustment may, at the discretion of the reviewing office, be deferred for a longer period when the facts in a given case, including but not limited to time case is being worked, cutoff dates, mailing time, etc., indicate that a 30-day period would be inadequate for consideration of the matter and reply by the beneficiary.

The only exception to this rule is when the overpayment results from the superendorsement procedures under Section 205(n) of the Act whereby payment of a combined check is made to the survivor. Under such circumstances the surviving beneficiary is given notice at the time of superendorsement of the adjustment action that will be taken to recoup the amount of the check which exceeds the amount to which the surviving individual is entitled in his own right.

In the above situation, an immediate adjustment action is taken.

5503.2 Person Liable Protests

(a) *General*

The action to be taken when a person from whom recovery is sought responds to an initial notice of overpayment depends on how and when the person responds, the reason for the response, and the method of recovery involved.

In response to an inital overpayment notice, the person may telephone, visit, or write to a DO or RSDI Reviewing office. Generally, the person contacts the DO where appropriate action is taken. In some cases, the reviewing office is contacted directly and a request for DO assistance usually needed to resolve the matter with the person.

The person may question the fact that he has been overpaid, the amount of the overpayment, or both. He may agree with the overpayment determination but dispute the need for recovery, or, although questioning neither the overpayment determination nor repayment of the overpaid amount, he may question

the means or rate of recovery or wish to make full refund instead of having his benefit adjusted. Or, because he does not fully understand the overpayment notice, he may not be in a position to exercise his rights relating to the overpayment and its recovery.

When feasible, the response to an overpayment notice should be handled by means of personal contact. Personal contact gives the employee an opportunity to make inquiry on pertinent issues, give explanation as appropriate, and observe the reactions of the overpaid person for evaluation purposes.

The extent of the development and the amount of corroborating evidence needed will be governed by what is reasonably necessary considering the relative importance of the recommended action and whether questions arise from conflicting statements and all the circumstances in the case. For example, less corroborating evidence would be acceptable in establishing the financial condition of the person overpaid where partial adjustment is the issue, rather than waiver of recovery of an overpayment. For waiver determinations, corroborating evidence may be required to validate a claim by the person overpaid that withholding his monthly benefit would cause hardship. In appropriate situations, obtain corroborating evidence to establish whether the person overpaid is without fault in causing the overpayments and whether recovery would be against equity and good conscience. Only in those cases however, where a request for reconsideration of the overpayment determination or for waiver or partial adjustment is made, or the response indicates that such relief may apply, should development along these lines be undertaken.

(*b*) *DO Action*

The action necessary by the DO in handling a response to an overpayment notice usually includes one or more of the following:

(1) Explanation of the overpayment, including use of the SSA–2339 (Request for Postentitlement Information) when the available information (including that available by a query of the ROAR record) does not permit a satisfactory response (§§ 9705 ff.).

(2) Completion of an SSA–561 (Request for Reconsideration) and submission of any additional evidence pertinent to appeal when the person disagrees with an overpayment determination (§§ 5503.4 and 7102–7135).

(3) Waiver development, including completion of an SSA–632 (Overpayment Recovery Questionnaire) or equivalent information, as well as resolution, if necessary, of the liability issue when the person protects recovery of overpayment or is appealing the overpayment determination (§§ 5503.5, 5510–5512 and 5540–5572).

(4) Completion of an SSA–1395 (Receipt and Transmittal Form) when refund is made and, if the person wants to repay in installments and adjustment is not available, completion of an SSA–633 (Agreement to Refund Overpayment) (§§ 5525–5525.9 and 9750 ff.).

(5) Establishment of a person's financial situation, usually involving completion of Part IV of an SSA–632, in connection with a request for partial adjustment (§§ 5503.55, 5515–5515.8).

(6) Completion of SSA–2521 (Request for Priority Action—Overpayment) when any of the preced-

ing apply *and* (A) recovery of the overpayment by adjustment has been proposed or is taking place and (B) there is no ROAR control of the overpayment (§§ 5503.6 and 5503.62).

(7) Completion of SSA–3079 (ROAR Input Data) when there is a ROAR record *and* (A) refund is the method of recovery and either (1), (2), or (3) apply *or* (B) adjustment has been proposed and any of the preceding apply (§ 5525.6).

Procedural due process requires that there be no recovery pending opportunity for the person to appeal the overpayment determination or show that the conditions for waiver are met. It is particularly important that benefits otherwise due not be interrupted to adjust an overpayment until the person has been afforded time to exercise his rights concerning the overpayment.

DO completion of the SSA–2521 and SSA–3079 insures that benefits are not withheld to recover an overpayment or that followup refund requests are not made until the person's reponse to an initial notice of overpayment has been resolved in accordance with the following sections.

5503.3 Request for Explanation of Overpayment

(*a*) *General*

Despite the explanation of the overpayment (i.e., how and when it occurred) and appeal and waiver rights in the initial notice of overpayment, the person may not understand why he was overpaid or how we arrived at the amount of overpayment, or the person may need additional information to decide on any further course of action (e.g., whether or how best

to appeal the overpayment determination or request that recovery be waived). Until this explanation is provided and the person has an opportunity to exercise his rights in connection with the overpayment, there should be no further recovery efforts.

(*b*) *DO Procedures*

When the information available in the DO (including that available by a query of the ROAR record) does not permit a satisfactory explanation of the overpayment, use an SSA–2339 to request additional information from the reviewing office (§§ 9705 ff.). Prepare and input SSA–3079 data (i.e., using Type of Action code "E"—§ 5525.6) if there is a ROAR record of the overpayment (§ 5525.5). Annotate the SSA–2339 "ROAR Input (Date)". If adjustment has been proposed or is taking place *and* no ROAR record exists, attach an SSA–2521 (§ 5503.62) as the transmittal document for the SSA–2339.

After providing the additional explanation of the overpayment, ascertain if the person wishes to request reconsideration or waiver.

1. Person Does Not Request Reconsideration or Waiver—If the person decides not to appeal the overpayment determination or request waiver, obtain a statement to this effect from the person whenever an SSA–2521 or SSA–3079 was prepared in connection with an SSA–2339 request or when the reviewing office in accordance with (c) below asked for DO assistance in providing the explanation. Forward the statement including any refund (other than a benefit check), SSA–1395, SSA–633, or request for partial adjustment to the reviewing office. If there is a ROAR record of the overpayment and partial adjust-

ment is requested, proceed as in § 5503.55, including update of ROAR (using Type of Action code "B"—§ 5525.6) before forwarding the partial adjustment request to the reviewing office.

2. Person Requests Reconsideration or Waiver—If the person wishes to appeal or requests that recovery be waived, proceed as in §§ 5503.4 or 5503.5, including update of ROAR (using Type of Action code "R," "W," or "C"—§ 5525.6).

(*c*) *Reviewing Office Procedure*

When the reviewing office receives a direct request for additional information or is unable to determine what action the person is requesting, forward the request with an explanation of the overpayment and a payment worksheet to the DO and ask that the DO contact the person. If a ROAR record of the overpayment exists, input the request for explanation to ROAR to prevent further recovery efforts (e.g., adjustment of benefits, reminder notice, etc.), and advise the DO of the action taken. If no ROAR record exists and adjustment has been proposed or is taking place, stop the adjustment, and advise the DO of the action taken.

5503.4 Request for Reconsideration of Overpayment

(*a*) *DO Procedures*

When a person requests reconsideration of an overpayment determination, have him complete form SSA–561 and submit any additional information pertinent to the appeal (§§ 7102–7135). Be certain, however, that the person wants to appeal the substantive determination (i.e., fact and/or amount) of over-

payment before obtaining a completed SSA–561. Do not have the person complete an SSA–561 if he is seeking only an explanation of the overpayment or is interested in requesting only waiver of recovery.

Note that a reconsideration request must be in writing.

When an SSA–561 is completed, insure that the specific reasons for requesting reconsideration of the overpayment determination are shown. In some cases, it will be necessary to obtain copies of negotiated checks (§§ 5705, 5819.5(b), 5822), for purposes of reconsidering an overpayment determination. Do not request the folder from the reviewing office in connection with a reconsideration request unless the person appealing asks that it be available for his review.

In addition, undertake full waiver development, including the completion of form SSA–632, and submission of any other information pertinent to a waiver determination (§§ 5540 ff.) unless (1) it is obvious that reconsideration will result in a determination that there is no overpayment or (2) the person does not want to pursue waiver. Explain to the person that, even if reconsideration affirms the overpayment determination, relief from repayment can be granted if the conditions for waiver are met and his failure to furnish the waiver information will generally result in a denial of waiver being included in the reconsideration notice. If the person refuses to provide the waiver information, secure a statement from him to this effect on the SSA–561 or on an SSA–795 or document this fact on an RC.

Immediately prepare and input an SSA–3079 using Type of Action code "R" (or "C", if both reconsidera-

tion and waiver are requested), if there is a ROAR record of the overpayment (§§ 5525.5–5525.6). Annotate the SSA–561 (or top-most document) "ROAR Input (Date)". If no ROAR record exists, immediately notify the reviewing office by using form SSA–2521 (§ 5503.62) to stop a proposed adjustment action because of the request for reconsideration unless the reviewing office has already been notified of the need for such action (e.g., in accordance with § 5503.3). However, do not delay the SSA–3079 or SSA–2521 merely because the reconsideration and waiver development require additional time.

Handle any request for withdrawal of the reconsideration request in accordance with § 7126.7. If the person in such case wishes to pursue waiver, follow the instructions in § 5503.5.

(*b*) *Reviewing Office Procedures*

Acknowledge in writing a timely reconsideration request when the person makes direct contact with the reviewing office, and take action to stop any further recovery actions, including the reinstatement of benefits (§ 5503.6(b)). The reviewing office also takes action to stop recovery action when notified of a timely reconsideration request by form SSA–2521 unless the DO has timely input SSA–3079 data in accordance with (a) above. Follow the instructions in §§ 7102 ff. and 8700 ff, for reconsidering the determination.

NOTE: If a person in appealing an overpayment determination contests the amount of overpayment, it may be necessary to secure copies of negotiated social security checks (§§ 5705, 5819.5(b), 5822) for purposes of the reconsideration determination. For example a

person alleges not having been paid for 2 months in which the overpayment notice stated that he had received monthly checks of $324 each.

Where an SSA–561 is received and it is clear that the person is not contesting the overpayment but is instead requesting relief from repayment (e.g. the only reason on the SSA–561 for requesting reconsideration is "The overpayment was not my fault, and I do not believe I should have to pay back the overpayment," and form SSA–632 is the only attachment), do not reconsider the overpayment determination. In the notice of the waiver determination, include the following:

> "Although you requested reconsideration of the overpayment determination, the reason you gave indicates that you are not questioning the fact or amount of overpayment but only the need for recovery. Although we have considered your reasons for asking that we waive recovery, we have not formally reviewed the overpayment determination. If we were wrong in not reconsidering the overpayment determination, please contact any social security office within 30 days of the date of this notice."

When the reconsideration determination has been made, make certain that the ROAR record is updated (§ 5525.6).

5503.5 DO Handling of Request for Waiver of Recovery

If the person requests waiver of recovery whether or not appealing the overpayment determination, have him complete an SSA–632 (§§ 5545–5545.5).

If a ROAR record exists (§§ 5525.5), prepare and input an SSA–3079 using Type of Action code "W"

(or "C", if both reconsideration and waiver are requested). The ROAR record will be updated by the reviewing office when the waiver determination is made.

If adjustment has been proposed or is in effect *and* no ROAR record exists, complete an SSA–2521, and send it to the reviewing office.

5503.55 DO Handling of Request or Different Rate of Repayment

A person who disagrees with neither the overpayment determination nor the need for recovery may request a different rate of repayment. Where full withholding has been proposed or is in effect, the person may request that only a part of his benefit be withheld each month until the overpayment has been fully adjusted (§§ 5515–5515.8), and, where refund is the method of recovery, the person may request refund in installments rather than immediate refund in a single payment (§§ 5525.4–5525.45).

Where a requested rate of repayment would permit full recovery within a 36 month period and is no less than $10 a month, there is no need to develop. If overpayment recovery would not be completed within 36 months, obtain financial information by having the person complete Parts III and IV of the SSA–632. If the rate of repayment based on the person's financial situation would be less than $10, develop waiver by having the person complete the SSA–632. For a discussion of partial adjustment, see §§ 5515–5516; see §§ 5525.4–5525.45 for a discusion of installment refund and use af the SSA–633.

If a person does not take issue with the overpayment determination or the need for recovery, do not

have the person complete an SSA–561 and do not develop for waiver unless the suggested rate of repayment would be less than $10. When a person against whom adjustment has been proposed or whose benefit is being withheld to recover an overpayment requests a lesser rate of adjustment, prepare and input an SSA–3079 (i.e., using Type of Action code "B") if there is a ROAR record of the overpayment (§§ 5525.53, 5525.54). Annotate the request (e.g., SSA–795) "ROAR Input (Date)." If adjustment has been proposed and no ROAR record exists, notify the reviewing office by using form SSA–2521 (§ 5503.6); if any necessary development will not be delayed, use the SSA–2521 to transmit the request.

5503.6 Use of SSA–2521

(*a*) *DO Procedures*

When a ROAR record of the overpayment does not exist *and* adjustment is the method of recovery, use the SSA–2521 (§ 5503.62) to notify the reviewing office of the following:

(1) Request for explanation of overpayment (§ 5503.3),

(2) Request for reconsideration of the overpayment determination (§ 5503.4),

(3) Request for waiver of recovery (§ 5503.5),

(4) Request for partial adjustment (§ 5503.55),

(5) Refund of an overpayment, and

(6) Request for reconsideration of a denial of waiver (§§ T5507, T5511)

When there is a ROAR record of the overpayment or adjustment is not the method of recovery, do not use the SSA–2521. Also, once payment continuation is assured do not use the SSA–2521.

To make proper use of the SSA–2521, the DO should be aware of the individual's payment status. Generally, the payment status will be clear from the information provided by the person and from the overpayment notice. The "Current" payment block (i.e., adjustment has been scheduled) or "Deferred" payment block (i.e., overpayment adjustment action has been taken) on the SSA–2521 should usually be checked. The "Unknown" block should seldom be checked.

If a request for overpayment reconsideration or waiver of recovery is received from an individual in suspension or deduction status and additional information is received showing that the benefits are otherwise payable, use an RC to alert the reviewing office of the request for reconsideration or waiver at the same time you input the posteligibility data to reinstate.

If reconsideration or waiver of recovery is requested and the SSA–2521 is being used, forms SSA–561 and/or SSA–632, or their equivalent, should be completed and sent to the reviewing office. If possible, full reconsideration and/or waiver development should accompany the SSA–2521. However, if unable to send the completed form(s) and development, check "Pending," and estimate when the necessary development will be sent.

Similarly, if partial adjustment is requested and the SSA–2521 is being used, the request and any information as required by §§ 5515 ff. should accompany the SSA–2521 to the reviewing office unless the development needed will be delayed (§ 5503.55). Explain to the person that the reviewing office will advise him when there has been a decision concerning his request for partial adjustment.

(b) Reviewing Office Procedures

If within 30 days of receiving the initial notice, the person requests reconsideration of the overpayment determination or waiver of recovery, or good cause is established for not making such request within 30 days, take action to stop the scheduled adjustment action and to restore all benefits withheld to recover the overpayment (§ T5505).

If the waiver request is made after 30 days, or if the reconsideration request is made after 30 days but prior to the expiration of reconsideration rights (i.e., within 60 days), and good cause for late filing cannot be established, any adjustment action in progress will be suspended and benefits reinstated effective with the date of the reconsideration or waiver request (§§ T5502(c) and T5505.7).

If good cause for late filing is established, any request is treated as though timely filed. If good cause is being developed, immediately reinstate effective with the date of request. After development, reissue back payments if good cause is established (§ T5505.7).

5513. Adjustment of Overpayments

Recoupment of an overpayment of title II benefits by adjustment is accomplished under sec. 204(a) of the Act by withholding benefits otherwise due the overpaid person on any E/R, or from other persons entitled to payments on the same E/R on which the overpayment was made (§ 5510(c)). See § 5513.2 for the order of priority of adjustment.

Where a representative payee is solely or jointly liable for repayment of an overpayment to a beneficiary (§ 5511) and fails to make refund, adjustment may be made against any benefits payable to the representative payee in his own right.

For the priority of adjusting overpayments when deduction and other withholding provisions are involved, see § 5430.

* * * * *

5513.3 Proposed Rate of Adjustment

When adjustment is the method of recovery, a withholding of the full monthly benefit (after any SMI premium deduction) will be proposed.

If, in response to a proposed withholding of the full monthly benefit, the beneficiary indicates that the amount to be withheld will cause financial hardship or otherwise protests recovery (§§ 5503.3 ff.), the rate of adjustment to recover an overpayment

not subject to waiver may be varied when the facts and circumstances in a given case dictate a different course (§§ 5515 ff.).

* * * * *

PARTIAL ADJUSTMENT

5515. Reasons for Partial Adjustment

When a beneficiary currently eligible for payment of title II benefits is liable for repayment of an overpayment, the initial notice of overpayment (§ 5503) will propose recovery of the overpayment by a withholding of the full amount of the benefit payable. Full withholding is generally not required, however, if a written or oral request for waiver or partial adjustment is received.

Partial adjustment to recover an overpayment serves three basic purposes:

(*a*) If the beneficiary is dependent upon some of his monthly benefits for ordinary and necessary living expenses, withholding only part of his benefit each month eases his financial situation to some extent by permitting the beneficiary to rely upon a part of the benefit for his current basic needs during the recovery period.

(*b*) If waiver depends upon whether adjustment would defeat the purpose of title II (§§ 5550–5551), withholding only part of a monthly benefit frequently enables us to effect full recovery of the overpayment without depriving the beneficiary of funds needed for ordinary and necessary living expenses.

* * * * *

Sections 5515.2–5516 explain the policies and procedures to be applied in granting partial adjustment

when relief from repayment is requested or premium collection is involved.

5515.2 When To Grant Partial Adjustment

(a) *Partial Adjustment Permitted*

Grant a request for partial adjustment, unless (1) the beneficiary has income and resources sufficient to meet current ordinary expenses despite a loss of the full monthly benefits or (2) there is evidence of fraud.

When an overpaid beneficiary does not take issue with the overpayment determination or the proposed adjustment and clearly requests only that adjustment be effected by withholding part of his monthly benefit do not have the beneficiary complete an SSA–561 or develop for waiver unless a withholding of less than $10 a month would result. Conversely, treat a request for waiver of recovery of an overpayment as a request for partial adjustment if waiver must be denied. Note that, if waiver depends upon a finding of defeat the purpose of title II and the beneficiary does not have the incorrect funds in his possession (§ 5546) and needs only part of his monthly benefit for ordinary and necessary living expenses (§§ 5550–5551), waiver should be denied and partial adjustment granted. However, if it would be necessary to withhold less than $10 a month to preclude a finding of defeat the purpose, approve waiver rather than great partial adjustment if the person is without fault. Of course, if the person is at fault in causing the overpayment, waiver cannot be approved and partial adjustment should be granted in accordance with § 5515.4(c).

(b) *Partial Adjustment Not Permitted*

Regardless of a beneficiary's alleged financial circumstances, never permit partial adjustment to recoup an overpayment which was the result of fraud (i.e., an intentional false statement or representation by the person against whose benefits adjustment is being made, or by his willful concealment of or deliberate failure to furnish material information). In such situation, full withholding of the benefit to adjust the overpayment is required. Also, see § 5502(c).

5515.4 Establishing Rate of Partial Adjustment

(a) *General*

If the beneficiary requests partial adjustment or a request for waiver must be denied, the rate of adjustment established will depend on the facts in the particular case. If partial adjustment only is requested, the beneficiary's financial situation generally will not be developed. Whether or not financial information is obtained, a person will not be considered at fault for purposes of partial adjustment unless a finding as to fault has been made in connection with a request for waiver. Where a withholding of less than $10 a month would be warranted by the beneficiary's financial circumstances, a finding as to fault must be made (§ 5515.2(a)).

(b) *When to Develop Financial Circumstances*

Where financial information has not been obtained in connection with waiver development, presume that withholding the full amount of the monthly benefit

will cause financial hardship unless (1) there is information to the contrary or (2) full recovery of the overpayment could not be completed by the suggested rate of adjustment within a 36 month period.

When the available financial information appears to warrant a rate of adjustment greater than the suggested rate of adjustment or the partial adjustment would not permit the overpayment to be recovered within 36 months, secure detailed financial information by having the beneficiary complete Parts III and IV of the SSA–632, and establish the rate of adjustment in accordance with (c) below.

(*c*) *Financial Circumstances Not Developed*

Where financial information was not developed in connection with a request for waiver and was not required by (b) above, grant partial adjustment at the rate suggested by the beneficiary. If the beneficiary does not suggest a monthly withholding amount, withhold one-fourth of the monthly benefit (prior to any premium deductions—see § 5516) to recover the overpayment. In figuring 25 percent of a person's benefit, round to the nearest whole dollar amount.

* * * * *

(*d*) *Financial Circumstances Developed*

When a beneficiary's financial circumstances are known (e.g., beneficiary completed Parts III and IV of the SSA–632 in connection with a request for partial adjustment or waiver), withhold that amount by which the beneficiary's income exceeds his expenses except as specified below.

(1) Withhold no less than $10 per month; *and*

(2) Withhold the full monthly benefit (after deduction for any SMI premium) to the extent of any incorrect funds in the beneficiary's possession; *and*

(3) Withhold 25 percent of the monthly benefit (before any deduction for SMI premiums) but no less than $10 monthly if the beneficiary was at fault in causing the overpayment and recovery at a rate less than 25 percent of the monthly benefit would not permit full recovery within 36 months (or before termination of entitlement).

Of course, if the beneficiary requests a greater rate of withholding, adjust at the rate suggested by the beneficiary.

If it would be necessary based on a comparison of income and expenses to withhold less than $10 from a person who is without fault, partial adjustment does not apply (§ 5515.2(a)).

If the comparison of income and expenses would indicate a withholding of less than 25 percent of the monthly benefit of a beneficiary who is a fault, establish the amount by which income exceeds expenses as the rate of adjustment provided full recovery will be completed within 36 months or prior to the beneficiary's expected last month of entitlement. However, where a withholding of less than 25 percent of the benefit would not permit full recovery within 36 months or, if earlier, the beneficiary's expected last month of entitlement, grant partial adjustment of 25 percent of the monthly benefit.

II. Pertinent Provisions of the Code of Federal Regulations, Title 20

20 C.F.R. Part 404 provides in pertinent part:

§ 404.502 Overpayments.

Upon determination that an overpayment has been made, adjustments will be made against monthly benefits and lump sums as follows:

(a) *Individual overpaid is living.* (1) If the individual to whom an overpayment was made is at the time of a determination of such overpayment entitled to a monthly benefit or a lump sum under title II of the Act, or at any time thereafter becomes so entitled, no benefit for any month and no lump sum is payable to such individual, except as provided in paragraphs (c) and (d) of this section, until an amount equal to the amount of the overpayment has been withheld or refunded. Such adjustments will be made against any monthly benefit or lump sum under title II of the Act to which such individual is entitled whether payable on the basis of such individual's earnings or the earnings of another individual.

(2) If any other individual is entitled to benefits for any month on the basis of the same earnings as the overpaid individual, except as adjustment is to be effected pursuant to paragraphs (c) and (d) of this section by withholding a part of the monthly benefit of either the overpaid individual or any other individual entitled to benefits on the basis of the same earnings, no benefit for any month will be paid on such earnings to such other individual until an amount equal to the amount of the overpayment has been withheld or refunded.

* * * * *

(c) *Adjustment by withholding part of a monthly benefit.* Adjustment under paragraph (a) and (b) of this section may be effected by withholding a part of the monthly benefit payable to an individual where it is determined that:

(1) Withholding the full amount each month would "defeat the purpose of title II," i.e., deprive the person of income required for ordinary and necessary living expenses (see § 404.508); and

(2) Recoupment can be effected in an amount of not less than $10 a month and at a rate which would not result in extending the period of adjustment beyond the earlier of the following:

(i) The expected last month of entitlement; or

(ii) Three years after the initiation of the adjustment action (except that in cases where the individual was "without fault" (see §§ 404.507 and 404.510), the period of adjustment may be extended beyond 3 years, if necessary); and

(3) The overpayment was not caused by the individual's intentional false statement or representation, or willful concealment of, or deliberate failure to furnish, material information.

* * * * *

[35 F.R. 5943, Apr. 10, 1970]

§ 404.502a Notice of right to waiver consideration.

Whenever an initial determination is made that more than the correct amount of payment has been made, notice of the provisions of sections 204(b) and 1870(c) of the Act regarding waiver of adjustment or recovery shall be sent to the overpaid individual and to any other individual against whom adjustment or recovery of the overpayment is to be effected (see § 404.506).

[37 F.R. 10554, May 25, 1972]

* * * * *

§ 404.506 When waiver of adjustment or recovery may be applied.

Sections 204(b) and 1870(c) of the Act provide that there shall be no adjustment or recovery in any case where an incorrect payment under title II (old-age, dependent's, survivor's and disability insurance benefits) or under title XVIII (hospital and supple-

mentary medical insurance benefits) has been made (including a payment under section 1814(e) of the Act) with respect to an individual:

(a) Who is without fault, and

(b) Adjustment or recovery would either:

(1) Defeat the purpose of title II of the Act, or

(2) Be against equity and good conscience.

[32 F.R. 18026, Dec. 16, 1967]

* * * * *

§ 404.508 Defeat the purpose of Title II.

(a) *General.* "Defeat the purpose of title II," for purposes of this subpart, means defeat the purpose of benefits under this title, i.e., to deprive a person of income required for ordinary and necessary living expenses. This depends upon whether the person has an income or financial resources sufficient for more than ordinary and necessary needs, or is dependent upon all of his current benefits for such needs. An individual's ordinary and necessary expenses include:

(1) Fixed living expenses, such as food and clothing, rent, mortgage payments, utilities, maintenance, insurance (e.g., life, accident, and health insurance including premiums for supplementary medical insurance benefits under title XVIII), taxes, installment payments, etc.;

(2) Medical, hospitalization, and other similar expenses;

(3) Expenses for the support of others for whom the individual is legally responsible; and

(4) Other miscellaneous expenses which may reasonably be considered as part of the individual's standard of living.

(b) *When adjustment or recovery will defeat the purpose of title II.* Adjustment or recovery will defeat the purposes of title II in (but is not limited to) situations where the person from whom recovery is

sought needs substantially all of his current income (including social security monthly benefits) to meet current ordinary and necessary living expenses.

[32 F.R. 18026, Dec. 16, 1967, as amended at 34 F.R. 14888, Sept. 27, 1969]

§ 404.509 Against equity and good conscience; defined.

"Against equity and good conscience" means that adjustment or recovery of an incorrect payment (under title II or title XVIII) will be considered inequitable if an individual, because of a notice that such payment would be made or by reason of the incorrect payment, relinquished a valuable right (examples (1), (2), and (5)) or changed his position for the worse (examples (3), and (4)). In reaching such a determination, the individual's financial circumstances are irrelevant.

[27 F.R. 1162, Feb. 8, 1962, as amended at 28 F.R. 14492, Dec. 31, 1963; 32 F.R. 18026, Dec. 16, 1967]

* * * * *

§ 404.905 Administrative actions that are initial determinations.

* * * * *

(b) *Modification of the amount of monthly benefits or lump sum.* The Administration shall, under the circumstances hereafter stated in this paragraph, make findings, setting forth the pertinent facts and conclusions, and an initial determination as to whether:

* * * * *

(4) There has been an overpayment or underpayment of monthly benefits or a lump sum and, if so, the amount thereof, and the adjustment under section

204(a) or section 204(d) of the Act, to be made by increasing or decreasing the monthly benefits or lump sum to which an individual is entitled;

* * * * *

§ 404.906 Administrative actions which are not initial determinations.

Administrative actions which shall not be considered initial determinations under any provision of the regulations in this Subpart J, but which may receive administrative review, include, but are not limited to, the following:

* * * * *

(e) The withholding by the Administration in any month, for the purpose of recouping an overpayment, of less than the full amount of the monthly benefit otherwise payable in that month (see § 404.502).

* * * * *

§ 404.907 Notice of initial determination.

Written notice of an initial determination shall be mailed to the party to the determination at his last known address, except that no such notice shall be required in the case of a determination that a party's entitlement to benefits has ended because of such party's death (see § 404.905(d)). If the initial determination disallows, in whole or in part, the application or request of a party, or if the initial determination is to the effect that a husband, widower, or parent was not receiving the requisite support from an insured individual, or that a party's entitlement to benefits has ended, or that a reduction, deduction, or adjustment is to be made in benefits or a lump sum, or that a period of disability established for a party has terminated, the notice of the determination sent to the party shall state the basis for the determination. Such notice shall also inform the party of the right to reconsideration (see § 404.910). Where more than the correct amount of payment has been made, see § 404.502a.

[37 F.R. 10554, May 25, 1972]

§ 404.908 Effect of initial determination.

The initial determination shall be final and binding upon the party or parties to such determination unless it is reconsidered in accordance with §§ 404.910–404.916, or it is revised in accordance with § 404.956.

§ 404.909 Reconsideration and hearing.

Any party who is dissatisfied with an initial determination may request that the Administration reconsider such determination, as provided in § 404.910. If a request for reconsideration is filed, such action shall not constitute a waiver of the right to a hearing subsequent to such reconsideration if the party requesting such reconsideration is dissatisfied with the determination of the Administration made on such reconsideration; and a request for a hearing may thereafter be filed, as is provided in § 404.917.

[25 F.R. 1677, Feb. 26, 1960, as amended at 28 F.R. 14492, Dec. 31, 1963]

§ 404.910 Reconsideration; right to reconsideration.

The Administration shall reconsider an initial determination if a written request for reconsideration is filed, as provided in § 404.911, by or for the party to the initial determination (see § 404.905). The Administration shall also reconsider an initial determination (unless the determination is with respect to the

revision of the Administration's earnings records) if a written request for reconsideration is filed, as provided in § 404.911, by an individual as a wife, widow, divorced wife, surviving divorced wife, surviving divorced mother, husband, widower, child, parent individual alleging equitable entitlement to a lump sum or representative of a decedent's estate, who makes a showing in writing that his or her rights with respect to monthly benefits, a lump sum, a period of disability, or entitlement to hospital or supplementary medical insurance benefits, may be prejudiced by such determination. The Administration shall also reconsider an initial determination relating to the revision of the Administration's record of the earnings (see § 404.905 (g)) of a deceased individual if a written request for reconsideration is filed, as provided in § 404.911, by a person as a widow, divorced wife, surviving divorced wife, surviving divorced mother, widower, child, parent, an individual alleging equitable entitlement to a lump sum, or representative of the decedent's estate.

[31 F.R. 16766, Dec. 31, 1966]

§ 404.911 Time and place of filing request.

The request for reconsideration shall be made in writing and filed at an office of the Social Security Administration or, in the case of an individual in the Philippines, at the Veterans' Administration or, in Philippines, at the Veterans' Administration Regional Office in the Philippines, or, in the case of an individual having 10 or more years of service in the railroad industry (see Subpart 0) or of an individual entitled to an annuity on the basis of an award under the Railroad Retirement Act prior to October 30, 1951, who requests in writing reconsideration with respect to his application to establish a period of disability under section 216(i) of the Act, at an office of the Railroad Retirement Board, within 60 days after the date of receipt of notice of the initial determination, unless such time is extended as provided in § 404.612 or § 404.953. For purposes of this section, the date of receipt of notice of the initial determination shall be presumed to be 5 days after the date of such notice, unless there is a reasonable showing to the contrary.

[41 FR 47917, Nov. 1, 1976]

§ 404.912 Parties to the reconsideration.

The parties to the reconsideration shall be the person who was the party to the initial determination (see § 404.905), and any other person referred to in § 404.910 upon whose request the initial determination is reconsidered.

§ 404.913 Notice of reconsideration.

If the request for reconsideration is filed by a person other than the party to the initial determination, the Administration shall, before such reconsideration, mail a written notice to such party at his last known address, informing him that the initial determination is being reconsidered. In addition, the Administration shall give such party a reasonable opportunity to present such evidence and contentions as to fact or law as he may desire relative to the determination.

[25 F.R. 1677, Feb. 26, 1960, as amended at 28 F.R. 14492, Dec. 31, 1963]

§ 404.914 Reconsidered determination.

The Administration shall, when a request for reconsideration has been filed, as provided in §§ 404.910 and 404.911, reconsider the initial determination in

question and the findings upon which it was based; and upon the basis of the evidence considered in connection with the initial determination and whatever other evidence is submitted by the parties or is otherwise obtained, the Administration shall make a reconsidered determination affirming or revising, in whole or in part, the findings and determination in question.

[25 F.R. 1677, Feb. 26, 1960, as amended at 28 F.R. 14492, Dec. 31, 1963]

§ 404.915 Notice of reconsidered determination.

Written notice of the reconsidered determination shall be mailed to the parties at their last known addresses. The reconsidered determination shall state the specific reasons therefor and inform the parties of their right to a hearing (see § 404.917), or, if appropriate, the requirements for use of the expedited appeals process (see § 404.916a).

[40 F.R. 53386, Nov. 18, 1975]

§ 404.916 Effect of a reconsidered determination.

The reconsidered determination shall be final and binding upon all parties to the reconsideration unless a hearing is requested in accordance with § 404.918 and a decision rendered or unless such determination is revised in accordance with § 404.956, or unless the expedited appeals process is used, in accordance with § 404.916a.

[40 F.R. 53386, Nov. 18, 1975]

* * * * *

§ 404.917 Hearing; right to hearing.

An individual has a right to a hearing about any matter designated in § 404.905 if:

(a) An initial determination and a reconsideration of the initial determination have been made by the Social Security Administration; and

(b) The individual is a party referred to in § 404.919 or § 404.920; and

(c) The individual has filed a written request for a hearing under the provisions described in § 404.918.

[31 F.R. 1676, Dec. 31, 1966]

* * * * *

III. Pertinent Statutory Provision

42 U.S.C. 404:

OVERPAYMENTS AND UNDERPAYMENTS

(a) Whenever the Secretary finds that more or less that the correct amount of payment has been made to any person under this subchapter, proper adjustment or recovery shall be made, under regulations prescribed by the Secretary, as follows:

(1) With respect to payment to a person more than the correct amount, the Secretary shall decrease any payment under this subchapter to which such overpaid person is entitled, or shall require such overpaid person or his estate to refund the amount in excess of the correct amount, or shall decrease any payment under this subchapter payable to his estate or to any other person on the basis of the wages and self-employment income which were the basis of the payments to such overpaid person, or shall apply any combination of the foregoing. A payment made under this subchapter on the basis of an erroneous report of death by the Department of Defense of an individual in the line of duty while he is a member of the uniformed services (as defined in section 410(m) of this title) on active duty (as defined in section 410(*l*) of this title) shall not be considered an incorrect payment for any month prior to the month such Department notifies the Secretary that such individual is alive.

(2) With respect to payment to a person of less than the correct amount, the Secretary shall make payment of the balance of the amount due such underpaid person, or, if such person dies before payments are completed or before negotiating one or more checks representing correct payments, disposition of the amount due shall be made in accordance with subsection (d) of this section.

(b) In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.

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